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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

NATIONAL ASSOCIATION OF BROADCASTERS, *et al.*,
Petitioners,

v.

ZELL MILLER, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 315(b)(1) of the Communications Act of 1934, 47 U.S.C. § 315(b), prohibits broadcasters from charging political candidates more than the "lowest unit charge" that broadcasters offer to other advertisers. The Federal Communications Commission issued a declaratory ruling that pre-empted all state law claims that purport to be based upon a violation of Section 315's "lowest unit charge" requirement. The issue presented in this this case is:

Whether challenges to an FCC order pre-empting state law causes of action based solely on alleged violations of the "lowest unit charge" requirement in Section 315(b) are reviewable by a court of appeals pursuant to Section 402(a) of the Communications Act and 28 U.S.C. § 2342, and whether that pre-emption order was valid.

PARTIES TO THE PROCEEDING

The parties in the proceeding below were:

As intervenors: National Association of Broadcasters; A.H. Belo Corporation; Allbritton Communications Company; American Family Broadcast Group, Inc.; CBS Inc.; Capital Cities/ABC, Inc.; Chris-Craft Industries, Inc.; Chronicle Publishing Company; Cosmos Broadcasting Corporation; Cox Enterprises, Inc.; Fox Television Stations, Inc.; Gillett Broadcasting of California, Inc.; Gillett Communications of San Diego, Inc.; Great American Television and Radio Company, Inc.; Kelly Broadcasting Company; Kelly Television Company; LIN Television Corporation; McGraw-Hill Broadcasting Company, Inc.; Meredith Corporation; Midwest Television Inc.; National Broadcasting Company, Inc.; New World Television Inc.; The New York Times Co.; Post-Newsweek Stations, Inc.; The Providence Journal Company; Spartan Communications, Inc.; The Times Mirror Company; Tribune Broadcasting Company; Westinghouse Broadcasting Company, Inc.; WKRG-TV, Inc.; WTVT, Inc.

As petitioners (respondents in this proceeding): Zell Miller; Zell Miller for Governor; Pierre Howard; Georgians For Howard '90; Johnny Isakson; Johnny Isakson For Governor; Andrew Young; Young Working For Georgia; Lauren McDonald; Lauren McDonald For Governor; Roy Barnes; Roy Barnes For Governor; Tim Ryles; Tim Ryles For Insurance Commissioner; Warren Evans; Warren Evans Election Committee; William L. Dickinson; Second District Campaign Committee; William J. Cabaniss; Friends of Bill Cabaniss Committee; Spencer T. Bachus, III; Bachus for Attorney General Committee; John Teague; James E. Folsom, Jr.; Jim Folsom, Jr. for Lieutenant Governor Committee; Fob James; Fob James for Governor Committee; Kenneth D. Wallis; Alabamians for Ken Wallis Committee; George D.H. McMillan, Jr.; The McMillan Committee; George Wallace, Jr.; Wallace for Treasurer Committee; Charles A. Graddick; Graddick for Governor Committee; William

J Baxley; Friends of Bill Baxley; Paul Hubbert; Richard Shelby; Don Siegelman; Jimmy Sullivan; Sonny Hornsby; Friends of E.C. Sonny Hornsby; Mark Kennedy; Judge Mark Kennedy for Supreme Court; and Friends of Judge Mark Kennedy.

The respondent in the proceeding below was the Federal Communications Commission.

Parties that participated in the proceeding below but that are not petitioners in this Court are the Tribune Broadcasting Co.; The Times Mirror Company; Kelly Broadcasting Company; Kelly Television Company; and Cosmos Broadcasting Corporation.

In addition, certain parties participating below are now represented by other parties. Westinghouse Broadcasting Company is now affiliated with CBS Inc. Great American Television and Radio Company is affiliated with Citicasters Co. New World Television Inc. has acquired Gillett Communications of San Diego, Inc. and WTVT, Inc.

RULE 29.6 LIST

Pursuant to Rule 29.6 of the Rules of this Court, petitioners state the following: A.H. Belo Corporation has no parent corporation or non-wholly owned subsidiaries. Allbritton Communications Corporation's parent corporation is Perpetual Corporation. Allbritton has no non-wholly owned subsidiaries. American Family Broadcast Group, Inc. has no non-wholly owned subsidiaries and its parent company is AFLAC Incorporated. CBS Inc., is an indirect wholly owned subsidiary of Westinghouse Electric Corporation, and has no non-wholly owned subsidiaries. Capital Cities/ABC, Inc. has no parent corporation and it identifies the following as its only non-wholly owned subsidiary: Worldwide Television News Corp. Chris-Craft Industries, Inc. has no parent corporation; its non-wholly owned subsidiaries are BHZ Communications, Inc. and United Television, Inc. Chronicle Publishing Company has no parent company or non-wholly

owned subsidiaries. Citicasters Co. is a subsidiary of Great American Broadcasting Co. which is in turn a subsidiary of Citicasters Inc. Citicasters Co. has no non-wholly owned subsidiaries. Cox Enterprises, Inc. has no parent corporation and maintains less than a one hundred percent interest in the following subsidiaries: Cox Communications, Inc.; Manheim Auctions, Inc.; TWC Cable Partners; TWC/TVRO Service Partnership; Innovative Media, Inc.; 18th Angel Productions, LDC.; Entertainment Tonight; and Trader Publishing Co. The parent corporation of Fox Television Stations, Inc. is News Corp. Limited and it has no non-wholly owned subsidiaries. LIN Television Corporation's parent corporation is AT&T Corp. and it has no non-wholly owned subsidiaries. McGraw-Hill Broadcasting Company, Inc.'s parent corporation is McGraw-Hill Inc. and it has no non-wholly owned subsidiaries. Meredith Corporation has no parent corporation or non-wholly owned subsidiaries. Midwest Television, Inc. has no parent corporation or non-wholly owned subsidiaries. National Association of Broadcasters has no parent corporation or non-wholly owned subsidiaries. National Broadcasting Co., Inc.'s parent corporation is General Electric Company. It wholly owns WKYC Holdings, Inc., which in turn has WKYC-TV, Inc. as a non-wholly owned subsidiary. The parent corporation of New World Television Inc. is New World Communications Group Inc. and it has no non-wholly owned subsidiaries. New York Times Co., Inc. has no parent corporation or non-wholly owned subsidiaries. The parent corporation of Post-Newsweek Stations Inc. is The Washington Post Company and it has no non-wholly owned subsidiaries. The Providence Journal Company has no parent corporation or non-wholly owned subsidiaries. Spartan Communications, Inc. has no parent corporation or non-wholly owned subsidiaries. WKRG-TV, Inc. has no parent corporation or non-wholly owned subsidiaries.

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OPINIONS BELOW

The opinion of the court of appeals (App. 1a-13a) is reported at 66 F.3d 1140 (11th Cir. 1995). The declaratory ruling of the Federal Communications Commission (App. 38a-59a) is reported at 6 FCC Rcd. 7511 (1991) ("Declaratory Ruling"). The FCC's order on reconsideration (App. 14a-37a) is reported at 7 FCC Rcd. 4123 (1992) ("Reconsideration Order"). The FCC's notice stating its intention to issue a declaratory ruling (App. 60a-65a) is published at 6 FCC Rcd. 5954 (1991) ("Notice of Declaratory Ruling").

JURISDICTION

The court of appeals rendered its judgment on September 29, 1995. On December 18, 1995, Justice Kennedy granted an extension of time to and including January 26, 1996, within which to file a petition for a writ of certiorari. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 47, Section 315(b) of the United States Code provides:

> The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed—
>
> (1) during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period; and
>
> (2) at any other time, the charges made for comparable use of such station by other users thereof.

47 U.S.C. § 315(b).

Title 47, Section 402(a) of the United States Code provides that

> Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this Act (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of title 28.

47 U.S.C. § 402(a).

Title 28, Section 2342 of the United States Code provides in relevant part that

> The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of (1) all final orders of the Federal Communications Commission made reviewable by Section 402(a) of title 47.

28 U.S.C. § 2342.

STATEMENT OF THE CASE

Section 315 of the Communications Act, 47 U.S.C. § 315, governs the terms and conditions under which political candidates must be afforded use of broadcasting stations during election campaigns. Section 315(b) specifically governs the rates that broadcasters must charge political candidates for that use, and provides that during certain periods candidates must be provided with "the lowest unit charge of the station for the same class and amount of time for the same period." In response to numerous actual and threatened lawsuits by candidates for elected offices, alleging that stations had charged too much for candidate advertising, the FCC declared "that any state cause of action dependent on any determination of the lowest unit charge under Section 315(b) . . . is preempted by federal law. The sole forum for adjudicating such matters shall be this Commission." App. 38a. This

Declaratory Ruling rested upon the FCC's exercise of its own congressionally delegated pre-emption power and its interpretation of Section 315(b).

Political candidates with pending state law claims that depended upon Section 315(b) petitioned the court below for review of the FCC's Declaratory Ruling. The court of appeals held that the FCC was without authority to pre-empt such state causes of action, that Congress could not give the agency such authority, and that the FCC's Declaratory Ruling was a mere expression of agency opinion without binding effect. Accordingly, the court dismissed the petition for review as not presenting a case or controversy.

The decision below is in direct conflict with decisions of this Court and of other courts of appeals upholding the power of federal agencies to pre-empt state law when acting within the scope of their congressionally delegated authority. The Eleventh Circuit's decision is also flatly inconsistent with the established decisions of this Court and of the courts of appeals recognizing the reviewability of declaratory rulings of the FCC and other federal agencies, and giving binding effect to such rulings when sustained. If allowed to stand, the decision would seriously jeopardize the ability of federal agencies to implement their statutory authority by pre-empting state law when reasonably necessary to carry out their delegated responsibilities. In particular, it would imperil the appropriate effort of the FCC to assure uniform, predictable interpretation of the lowest unit charge requirements for sale of political 1996 election periods. It also would encourage a multiplicity of litigation in state and federal courts leading to inconsistent results and would create a major deterrence to the carriage by broadcast stations of candidate programs whenever carriage is not mandated by statute.

1. Congress has entrusted the regulation of political advertising rates to the FCC for over 40 years. Between 1952 and 1972 (when the current version of Section 315

was enacted), Section 315 required broadcasters to charge political candidates advertising rates for their uses of the station that were comparable to the charges available on that station for other commercial advertisements. See An Act to Further Amend the Communications Act of 1934, Pub. L. No. 554, ch. 879, 66 Stat. 711, 717 (1952).

In 1972, as part of the Federal Election Campaign Act, Congress retained the "comparable use" standard, but amended Section 315 to add the "lowest unit charge" requirement of Section 315(b)(1) that applies during specified periods of time prior to elections. Even though the Communications Act generally provides the FCC with broad enforcement powers, 47 U.S.C. §§ 154(i), 303(r), Congress expressly delegated to the FCC the more specific duty to interpret and enforce the specific requirements of Section 315. In subsection (d), Congress in 1952 specifically directed that the FCC "shall prescribe appropriate rules and regulations to carry out the provisions" of Section 315. 47 U.S.C. § 315(d). This additional power provides the FCC with "something more than the normal grant of authority permitting an agency to make ordinary rules and regulations." *Chisholm* v. *FCC*, 538 F.2d 349, 357 (D.C. Cir.), *cert. denied*, 429 U.S. 890 (1976).

Since Section 315(b) was enacted, the FCC has devoted substantial efforts to interpreting the "lowest unit charge" requirement of the Act and to ensuring that stations comply with their obligations under Section 315. For example, beginning in the 1970s, the FCC issued numerous decisions that evaluated the impact of various advertising sales practices on the determination of the "lowest unit charge."[1] In 1978 and again in 1984, the

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[1] *See, e.g., Community Broadcasting Co.*, Letter, 35 F.C.C.2d 663 (1972) (public service announcements broadcast at no charge); *Eugene T. Smith*, Letter, 34 F.C.C.2d 622 (1972) (commissions to advertising agencies); *KGWA Pub. Broadcasting Serv., Inc.*, Letter, 34 F.C.C.2d 1103 (1972) (additional spots for non-profit groups); *Korral Radio, Inc.*, Letter, 48 F.C.C.2d 531 (1974) (additional spots for city business); *Radio Station WBGR*, 36 Rad. Reg. 2d

FCC published a Political Broadcasting Primer that provided significant guidance on the law of political broadcasting. See *The Law of Political Broadcasting and Cablecasting*, Public Notice, 69 F.C.C.2d 2209 (1978); *Political Primer 1984*, 100 F.C.C.2d 1476 (1984). More recently, the FCC in 1990 undertook an independent audit of 30 broadcast stations to assess compliance with Section 315(b) and to clarify the FCC's prior interpretations of the lowest unit charge provision.[2] In 1991, the FCC completed a rulemaking to update and elaborate on all of its political programming rules, including Section 315(b).[3] All the while, the FCC has continued to adjudicate complaints against broadcasters and, when appropriate, to order rebates and assess fines for violations of Section 315(b).[4]

As a result of its vigorous administration of Section 315(b), the FCC has acquired an "understanding of the

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(P&F) 888 (1976) (volume discounts). The FCC also adjudicated disputes between broadcasters and candidates over the proper charges for political advertisements. *See, e.g., Holden E. Sanders* v. *Station WIXC*, Letter, 52 F.C.C.2d 592 (1975); *Turner Communications Corp.*, Memorandum Opinion and Order, 36 Rad. Reg. 2d (P&F) 537 (1976); *James H. Doyle*, 38 Rad. Reg. 2d (P&F) 330 (1976).

[2] *Political Programming Audit*, Public Notice, 68 Rad. Reg. 2d (P&F) 113 (1990). Shortly after the Audit, the FCC issued a series of statements that clarified how the lowest unit charge requirement should be applied to various factual settings. *Questions and Answers Relating to Political Programming Law*, News Release, 68 Rad. Reg. 2d (P&F) 188 (1990).

[3] *Codification of the Commission's Political Programming Policies*, Report and Order, 7 FCC Rcd. 678 (1991), *Erratum*, 7 FCC Rcd. 920 (M.M.B.), *reconsidered in part*, 7 FCC Rcd. 1616 (1992), *further recons.*, 9 FCC Rcd. 7919 (1994).

[4] *See, e.g., Southern Arkansas Radio Co.*, Letter, 5 FCC Rcd. 4643 (1990) (rebates ordered for overcharges); *Alpha Broadcasting Corp.*, Memorandum Opinion and Order, 102 F.C.C.2d 18, 26 (1984) (assessing fine and requiring rebates for overcharges); *Lawton Chiles, Bob Martinez, and Bill Nelson Against WTVT (TV)*, Order, 9 FCC Rcd. 1593, 1596 (1994) (ordering rebate for overcharges).

complex and often arcane practices of the broadcast advertising industry." Declaratory Ruling (App. 48a). The FCC's expertise is even more necessary today because, as a recent House Report confirms, "the term 'lowest unit charge' is difficult to understand, interpret, and apply" to the "dizzying array" of sales practices currently being used in broadcast advertising. H.R. Rep. No. 871, 101st Cong., 2d Sess. 6 (1990). What makes the issues particularly suitable for expert agency resolution is that they depend essentially on policy judgments about how best to balance the competing interests of broadcasters and candidates in a way that maximizes candidate access to the airwaves.[5]

2. Even though the FCC provided an expert forum in which to resolve disputes over the lowest unit charge and to provide candidates with rebates of any overcharges imposed by broadcasters, certain candidates beginning in 1990 filed lawsuits against broadcasters in state and federal court.[6] The candidates asserted common law

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[5] For example, when the Commission undertook in 1991 to review the lowest unit charge rules, it revised its previous policy concerning the treatment of package advertising plans offered by broadcast stations. Package plans are "established combinations of spots offered at a given price, which are generally available to all customers." *Codification of the Commission's Political Programming Policies*, Report and Order, 7 FCC Rcd. 678, 694 & n.159 (1991). The FCC revised its policy to permit candidates to have the benefit of any package rate without having to purchase all of the items in the package. This is precisely the kind of policy judgment that the FCC is uniquely suited to make and illustrates why Section 315 issues should be decided by a single expert agency.

[6] Indeed, the candidates' lawsuits were prompted by the findings of the FCC in its 1990 audit that some broadcasters were charging candidates higher rates than other advertisers. Despite the FCC's investigation of these issues, the candidates nevertheless filed suit in state court. The candidates frankly acknowledged that this was done in order to obtain a "convenient state forum." Reconsideration Order (App. 24a n.35).

breach of contract and fraud claims based entirely on alleged overcharges for political advertising under Section 315(b). The candidates also sought punitive damages.

The FCC expressed concern that such suits would result in inconsistent interpretations of the proper standards governing Section 315(b), thereby creating uncertainty for both candidates and broadcasters. Accordingly, the FCC provided notice and solicited comments regarding its intention to issue, on its own motion, a declaratory ruling to pre-empt state law causes of action based on any determination of the lowest unit charge provision of Section 315(b). Notice of Declaratory Ruling (App. 60a-64a). Petitioners commented on the Commission's proposal urging its adoption. Representatives of the candidates filed comments opposing the proposed Declaratory Ruling. After considering all of those comments the FCC issued its Declaratory Ruling and announced that "any state cause of action dependent on any determination of the lowest unit charge under Section 315(b) of the Communications Act, or of some other duty arising under that subsection, is preempted by federal law." App. 38a.

In the portion of its Ruling that is directly relevant to this petition, the FCC held that the "Commission itself has authority to preempt such claims." *Id.* at 44a. Relying on this Court's decisions in *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141 (1982) and *City of New York* v. *FCC*, 486 U.S. 57 (1988), the FCC noted the standards necessary for agency pre-emption and concluded that its "preemption of state claims arising under Section 315(b) meets th[ose] standards." App. 45a.

In analyzing those standards, the FCC stated that it "clearly has the authority to enforce the lowest unit charge requirement," *id.*, and noted that, under Section 315(d), it has explicit authority to prescribe "rules and regula-

tions to carry . . . [this] provision[]" into effect. 47 U.S.C. § 315(d). The FCC then concluded that pre-emption was a " 'reasonable accommodation of conflicting policies' " under Section 315(b). App. 48a (quoting *City of New York*, 486 U.S. at 64).

The FCC gave two specific reasons why it was invoking its pre-emption authority. First, the FCC stated that pre-emption was necessary to "develop[] uniform standards for interpreting and enforcing Section 315(b)." *Id.* at 45a. The FCC concluded that "[r]ulings by courts in numerous jurisdictions around the country almost certainly would produce varying and possibly conflicting determinations" of Section 315(b), with the result that "both candidates and broadcasters [would be] unsure of their respective rights and responsibilities under the lowest unit charge requirement." *Id.* at 46a. Second, noting that broadcasters are generally not required by law to offer advertising time to all political candidates, see p. 22, *infra*, the FCC concluded that "inconsistent rulings on Section 315(b) lawsuits might encourage some stations simply to refuse to accept political advertisements." *Id.* at 47a. The certainty provided by a uniform law would remove these disincentives. Accordingly, the Commission concluded that pre-emption of state causes of action under Section 315(b) would further Congress's goals of providing " 'candidates for public office greater access to the media' " and " 'halt[ing] the spiraling cost of campaigning for public office,' " *id.* (quoting S. Rep. No. 96, 92d Cong., 1st Sess. 20 (1972)).

Certain candidates requested the FCC to reconsider its pre-emption order, but the FCC re-affirmed all aspects of its Declaratory Ruling. Reconsideration Order (App. 15a). The same group of candidates, several of whom had initiated the state and federal lawsuits that sparked the FCC's Ruling, filed a petition for review in the Eleventh Circuit under 47 U.S.C. § 402(a) and 28 U.S.C.

§ 2342(1). Petitioners intervened in support of the FCC's Declaratory Ruling.

3. The court of appeals dismissed the petition. The court's holding was squarely premised upon a summary rejection of the FCC's use of its own pre-emption powers. The court held that the FCC had no independent authority to pre-empt state causes of action under Section 315(b): "it is axiomatic that Congress has not delegated, and could not delegate, the power to any agency to oust state courts and federal district courts of subject matter jurisdiction." App. 9a.

After this holding—for which it cited no authority—the court stated that the only issue remaining was whether the FCC was correct in its analysis that Congress had impliedly pre-empted state causes of action under Section 315(b). On this issue, the court stated that it was being asked "whether, at some future date, a candidate may bring a breach of contract action in state court contending that a broadcaster's rates" violated Section 315(b), or whether such an action was, as the FCC found, pre-empted by Congress. *Id.* at 11a (footnote omitted). The court of appeals held that, because such a question would require "decid[ing] what another court should do in a future case," its opinion would be advisory. *Id.*

As the FCC explicitly recognized, the invocation of its pre-emption power presents a case or controversy.[7] The court, however, rejected this premise, suggesting

[7] The FCC stated that "[f]inal decisions of the Commission concerning Section 315(b), *including this declaratory ruling*, are *of course* subject to judicial review by the United States Court of Appeals and, ultimately the United States Supreme Court. 47 U.S.C. § 402(a); 28 U.S.C. § 2342(1)." Reconsideration Order (App. 26a-27a n.42) (emphases added); *see also* Declaratory Ruling (App. 51a n.45) ("Our preemption order clearly is subject to judicial review pursuant to Section 402(a) of the Communications Act, 47 U.S.C. § 402(a). *See also* 28 U.S.C. § 2342 *et seq.*").

that the Declaratory Ruling may not be reviewable in a court of appeals under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1). In an effort "to characterize appropriately the FCC action," the court stated that the Declaratory Ruling was neither a rulemaking proceeding nor an adjudication. App. 9a. Instead, the court termed the Ruling as "an agency opinion—a pronouncement interpreting the Communications Act to the effect that Congress impliedly abolished state and federal court jurisdiction over lowest unit charge violations." *Id.*

REASONS FOR GRANTING THE PETITION

Petitioners nominally prevailed below because the petition for review was dismissed. But this victory is utterly Pyrrhic because on its way to dismissing the petition, the court of appeals gutted the Declaratory Ruling by holding that it had no binding effect on any court. Thus, notwithstanding the language dismissing the petition, the decision under review in fact granted the candidates complete relief by encouraging them to bring their overcharge claims in whatever jurisdiction they choose. This was precisely what the candidates wanted and precisely what the FCC and petitioners sought to avoid.

But the plight of petitioners and the FCC in this particular dispute, albeit extremely significant, is not the ultimate reason why this Court should grant review. The reasons for granting review are two-fold. First, the court of appeals' holding that the FCC has no power to preclude state courts from attempting to enforce the requirements of Section 315(b) is a breathtaking and completely unsupported departure from settled caselaw concerning the authority of federal agencies to pre-empt state law when necessary to administer a federal statute effectively. In repeatedly upholding the power of federal agencies to pre-empt state law, this Court has emphasized that valid "[f]ederal regulations have no less pre-emptive effect than

federal statutes." *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153 (1982); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 698-700 (1984); *City of New York* v. *FCC*, 486 U.S. 57, 63-64 (1988). By contrast, under the Eleventh Circuit's view, federal agency authority is more limited than Congressional action. Although this Court plainly has held that the federal government may pre-empt all types of state law, including state common law, see *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 514-23 (1992), the Eleventh Circuit denies to agencies the power to pre-empt state law when it is judge-made.

Second, the decision below deprives the FCC and all other federal agencies of the authority to implement federal law through declaratory rulings, which are a time honored and heretofore unquestioned method of allowing federal agencies to provide clear and binding guidelines to the entities they regulate and to the public generally. Thus, the Eleventh Circuit now requires agencies to pre-empt state law strictly by "regulations" and orders following adjudications, rather than by declaratory order, as the FCC did here. Even though declaratory rulings are an established and accepted method of agency action, see 5 U.S.C. § 554(e), and even though a declaratory ruling is plainly a reviewable "final order[]," 28 U.S.C. § 2342(1), the Eleventh Circuit has held that the FCC may not use a declaratory ruling to pre-empt state law. These profound and unwarranted departures from accepted principles of administrative law are not matters of mere academic interest.

The practical significance of the Eleventh Circuit's decision provides further compelling support for review in this Court. The decision below limits the ability of all federal agencies to pre-empt state common law and to implement important federal policies through declaratory orders. In addition, the Eleventh Circuit's holding has invited the disruption of the FCC's effort to administer an important federal law and courts have already reached in-

consistent outcomes concerning the pre-emption of state law claims under Section 315. Moreover, because the validity of the FCC's order is now placed in question, courts may feel free to reach the merits of claims under Section 315(b), producing precisely the same inconsistent results that the FCC intended to prevent by issuing its order. This uncertainty is particularly intolerable in light of the upcoming elections in 1996. The question of what law applies to the rates charged by broadcasters for political advertising and who is authorized ultimately to decide what is the lowest unit charge are matters that will affect significantly how much access candidates will have to broadcast facilities during the period leading up to the upcoming elections. Accordingly, it is important that the Court resolve these issues as quickly as possible.

1. The linchpin of the Eleventh Circuit's decision is its *ipse dixit* that "it is axiomatic that Congress has not delegated, and could not delegate, the power to any agency to oust state courts and federal district courts of subject matter jurisdiction." App. 9a. This statement fundamentally misconstrues this Court's decisions defining an agency's authority to pre-empt state law. Contrary to the decision below, this Court has made clear without exception that "a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation and hence render unenforceable state or local laws." *City of New York*, 486 U.S. at 63-64 (internal quotations and citation omitted).

When examining whether state law has been pre-empted, this Court has repeatedly and consistently held that pre-emption applies equally to all state laws, no matter whether judge-made, legislated or adopted administratively.[8] Because Congress has the power to pre-empt state

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[8] *See, e.g., Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 522 (1992) ("At least since *Erie R.* v. *Tompkins*, . . . we have recognized the phrase 'state law' to include common law as well as

common law, and because an agency derives its pre-emption authority from Congress, it necessarily follows that federal agencies may pre-empt state common law, so long as they do so expressly. See *Hillsborough County* v. *Automated Medical Labs., Inc.*, 471 U.S. 707, 714-16 (1985). The proper analysis in no way depends upon the nature of the state law at issue. Instead, *de la Cuesta* makes plain that, in dealing with federal agency pre-emption, the only two issues are "whether [the agency] meant to pre-empt [state] law, and, if so, whether that action is within the scope of the [agency's] delegated authority." *de la Cuesta*, 458 U.S. at 154.

The FCC's desire to pre-empt state law could not have been expressed more plainly. Similarly, there can be no serious doubt that the Declaratory Ruling pre-empting state law claims based on Section 315(b) is within the FCC's authority. Congress has granted to the FCC extremely broad power to administer generally the Communications Act. See 47 U.S.C. §§ 154(i), 303(r). This grant of authority alone provides an ample basis to pre-empt state causes of action arising under Section 315(b). *Cf. City of New York*, 486 U.S. at 70 n.6 (refusing to consider whether Sections 4(i) and 303(r) of the Communications Act provide the FCC with the authority to pre-empt state-imposed technical standards for cable television). In fact, most courts examining the issue have found that "[i]t is apparent from an examination of the 1934 Act that enforcement of the statute and vindication of the public interest are vested in the Federal Communications Com-

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statutes and regulations."); *American Airlines* v. *Wolens*, 115 S. Ct. 817, 824 (1995); *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 208-13 (1985). In fact, this Court has held that Section 315 of the Communications Act pre-empts state common law libel actions. *See Farmers Educ. & Coop. Union of Am.* v. *WDAY, Inc.*, 360 U.S. 525 (1959).

mission." *Belluso* v. *Turner Communications Corp.*, 633 F.2d 393, 397 (5th Cir. 1980).[9]

In addition to its general authority under the Communications Act, the FCC has been granted by Congress in Section 315(d) "something more than the normal grant of authority permitting an agency to make ordinary rules and regulations." *Chisholm* v. *FCC*, 538 F.2d 349, 357 (D.C. Cir.), *cert. denied*, 429 U.S. 890 (1976). As one court stated, Subsection 315(d)

> amounts to a congressional direction to the FCC to recognize the importance of this particular section of the statute and to prescribe separate rules and regulations to deal with the multitudinous situations that arise in applying it to all federal, state and local candidates for office throughout the nation.

Kay v. *FCC*, 443 F.2d 638, 643-44 (D.C. Cir. 1970). Section 315(d) provides an even stronger basis to conclude that the FCC was "acting within the scope of its congressionally delegated authority," *City of New York*, 486 U.S. at 63 (internal quotations and citation omitted), when it pre-empted state causes of action based solely upon Section 315(b).

The court of appeals' unsupported creation of an exemption in the pre-emption doctrine for a state's common law decision making squarely contradicts *de la Cuesta*, which held that an agency's regulation that permitted a federal savings and loan to include a "due-on-sale" clause in a

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[9] For similar reasons, every court examining the issue has found that Congress did not provide a private right of action under Section 315(a), and the same reasoning applies to Section 315(b). *See Belluso*, 633 F.2d at 396; *DeYoung* v. *Patten*, 898 F.2d 628, 633-34 (8th Cir. 1990); *adhered to in relevant part, Forbes* v. *Arkansas Educ. Television Communication Network Found.*, 22 F.3d 1423 (8th Cir. 1994); *Daly* v. *Columbia Broadcasting Sys., Inc.*, 309 F.2d 83, 85-86 (7th Cir. 1962). The panel's concern that the FCC's Declaratory Ruling "oust[s] . . . federal district courts of subject matter jurisdiction" is therefore groundless; Congress, and not the FCC, has provided that there is no federal right of action under Section 315.

loan instrument pre-empted the *"Wellenkamp* doctrine," which was created by "California courts" to limit the exercise of those clauses. *de la Cuesta,* 458 U.S. at 141-42. It cannot seriously be argued that *de la Cuesta* would have been decided differently if the effect of the Federal Home Loan Bank Board's regulation had been characterized as ousting state courts of jurisdiction to interfere with a savings and loan's attempt to enforce a "due-on-sale" clause in a private mortgage rather than simply as declaring such clauses enforceable regardless of state law. Indeed, in the Declaratory Ruling, the FCC pre-empted only state court actions premised *on federal law,* whereas in *de la Cuesta* the Court upheld an agency's pre-emption of state court enforcement of mortgage law policy, a matter well within the traditional domain of state courts.

2. The Eleventh Circuit's holding that it was not presented with a live case or controversy was based on the additional misconception that the FCC's Declaratory Ruling was in some sense an impermissible method of agency action. The court expressed discomfort deciding the question of "whether, at some future date, a candidate may bring a breach of contract action in state court contending that a broadcaster's rates exceeded the lowest unit charge." App. 11a (footnote omitted). However, the court failed to understand that the whole purpose of a declaratory order is to resolve a concrete dispute before actual sanctions are imposed. The court also appeared to doubt that the Declaratory Ruling was in fact a "final order" that is subject to the exclusive review of a court of appeals. See pp. 10-11, *supra.* That holding, by itself, is worthy of certiorari, because it is clearly wrong and conflicts with decisions of both this Court and other courts of appeals.

The FCC is empowered by the Administrative Procedure Act ("APA") and its own rules to issue declaratory rulings such as the one in this case. Section 5(d) of the APA provides that an agency, "with like effect as in the

case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty." 5 U.S.C. § 554(e); see also 47 C.F.R. § 1.2 (FCC regulation implementing this authority). The plain meaning of the statute authorizes the FCC to issue declaratory relief, for it was clearly acting to "remove [the] uncertainty" surrounding the proper forum for resolving claims arising under Section 315.

Moreover, since declaratory orders are treated "with like effect as in the case of other orders," 5 U.S.C. § 554 (e), the FCC's Declaratory Ruling is subject to exclusive appellate review under the same standards as other FCC orders. As this Court has held, "[e]xclusive jurisdiction for review of final FCC orders . . . lies in the Court of Appeals. 28 U.S.C. § 2342(1); 47 U.S.C. § 402(a)." *FCC* v. *ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984). Under the Hobbs Act, 28 U.S.C. § 2342 (1), an agency action is final if it "impose[s] an obligation, den[ies] a right or fix[es] some legal relationship." [10] The Eleventh Circuit indicated that the FCC's Declaratory Ruling was not in fact a final order. After deciding that the Declaratory Ruling was neither a regulation nor an adjudication of a pending case, the court termed it an "agency opinion" and a mere "pronouncement interpreting the Communications Act." App. 9a.

There can be no doubt that the Declaratory Ruling is a final order. First, the FCC has acted to "terminate a controversy" and "remove uncertainty." 5 U.S.C. § 554 (e); see also 47 C.F.R. § 1.2. It did so by resolving conflicting lower court decisions concerning the exclusivity of the Commission's jurisdiction to enforce Section 315(b)

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[10] *Illinois Citizens Comm. for Broadcasting* v. *FCC*, 515 F.2d 397, 402 (D.C. Cir. 1975) (internal quotation omitted); *see also Sprint Corp.* v. *Evans*, 846 F. Supp. 1497, 1509 (M.D. Ala. 1994) ("Any final decision made by the FCC about its power to preempt state regulation is reviewable de novo by the United States Court of Appeals.").

and by terminating all lawsuits that threaten its traditionally exclusive and expert administration of Section 315(b), thereby leaving candidates exclusively to their administrative remedy before the Commission.[11]

Because the Declaratory Ruling thus eliminates candidates' ability to enforce, in any forum other than the Commission, the "lowest unit charge" requirement of Section 315(b) and all claims dependent on that requirement, "rights or obligations have been determined [by] or legal consequences will flow from" the Ruling. *Port of Boston Marine Terminal Ass'n* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970); *Sierra Club* v. *United States Nuclear Regulatory Comm'n*, 862 F.2d 222, 225 (9th Cir. 1988).

Second, the Declaratory Ruling is, without question, an order. An "order" is defined under the APA as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making." See 5 U.S.C. § 551(6); see also *id.* § 551(7). The Declaratory Ruling falls squarely within this definition.

As its name implies, the Ruling is declaratory in nature, setting forth the agency's decision to pre-empt state law causes of action premised on determinations of lowest unit charge under Section 315(b). The proceeding was not a rulemaking because a rule, by definition, can only have "future effect." 5 U.S.C. § 551(4); see gen-

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[11] Notice of Declaratory Ruling (App. 60a-65a); *see also* Declaratory Ruling (App. 48a) ("The emergence of civil litigation in a number of courts around the country raises a real possibility of conflicting rulings as to what constitutes the 'lowest unit charge' and what remedies are appropriate for violations of the statutory requirement. The FCC is the authority specifically designated by Congress to enforce the lowest unit charge requirement, however, precisely because it has the expertise necessary to make such determination based upon its understanding of the complex and often arcane practices of the broadcast advertising industry.") (footnote omitted).

erally *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 216-23 (1988) (Scalia, J., concurring) (same). The Declaratory Ruling, by contrast, applies not just prospectively to bar future court suits to enforce Section 315(b), but also retrospectively to bar suits initiated prior to the issuance of the Ruling. See App. 41a (declaring that because Section 315(b) claims are enforceable only before the FCC, and not in court, any "lawsuit based directly upon allegations of violations of Section 315(b) should be dismissed").

To the extent any doubt remains on this issue, Section 554(e) dispels it. That statute makes it clear that declaratory orders are orders by providing that declaratory orders have the same "effect as in the case of *other orders*." 47 U.S.C. § 554(e) (emphasis added). The undeniable implication is that declaratory orders are indeed orders for purposes of judicial review and, for that reason, are entitled to the same effect as more traditional forms of orders. See, *e.g.*, *Rock Creek Ltd. Partnership* v. *State Water Resources Control Bd.*, 972 F.2d 274 (9th Cir. 1992) (reviewing and upholding Federal Energy Regulatory Commission delaratory order setting forth interpretation of statute), *cert. denied*, 113 S. Ct. 2439 (1993); *New York State Comm'n on Cable Television* v. *FCC*, 749 F.2d 804, 807, 815 (D.C. Cir. 1984); *New York State Broadcasters Ass'n* v. *United States*, 414 F.2d 990, 994 (2d Cir. 1969), *cert. denied*, 396 U.S. 1061 (1970). Therefore, under a straightforward reading of the APA, declaratory orders are "orders." This Declaratory Ruling like all declaratory rulings is a significant tool that agencies can and do use to settle uncertainty in the law and to implement important federal policies. By holding that such rulings are not subject to appellate review because they are not binding, the Eleventh Circuit has dealt a serious and unwarranted blow to all federal agencies' ability effectively to enforce the statutes they administer.

Consistent with this analysis, the overwhelming weight of authority from this Court and the courts of appeals has

upheld appellate review of declaratory rulings of administrative agencies, and the FCC's Declaratory Ruling clearly falls within this principle. Indeed, this Court has held that an agency can "issue[] a declaratory order in the course of its adjudication which would [be] subject to judicial review." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 372-73 n.3 (1969); see also *Frozen Food Express* v. *United States*, 351 U.S. 40, 44 (1956); *Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees of Am.* v. *Lockridge*, 403 U.S. 274, 328-29 n.6 (1971) (White, J., dissenting) (collecting cases). Several courts of appeals have upheld the review of FCC declaratory orders specifically on the issue of pre-emption. *North Carolina Utils. Comm'n* v. *FCC*, 537 F.2d 787, 790-91 & n.2 (4th Cir.) (reviewing FCC's pre-emptive declaratory ruling), *cert. denied*, 429 U.S. 1027 (1976); *New York State Comm'n on Cable Television*, 749 F.2d at 807, 815 (same); *New York State Comm'n on Cable Television* v. *FCC*, 669 F.2d 58, 62 & n.9 (2d Cir. 1982) (same); see also *New York State Broadcasters Ass'n*, 414 F.2d at 994 (reviewing FCC's declaratory ruling).

The most notable holding to the contrary was issued by the Eleventh Circuit's predecessor and, interestingly, was authored by the same judge as the opinion below. See *City of Miami* v. *ICC*, 669 F.2d 219 (5th Cir. 1982) (holding that Interstate Commerce Commission's declaratory order was not a final order and was therefore not reviewable). This Court should grant certiorari to confirm the principle that federal agencies may issue declaratory orders to pre-empt state law and that when they do so, those declaratory orders—like all other orders—are reviewable exclusively in a court of appeals.

3. In addition to the clear legal errors embodied in the decision below, review is warranted because of the adverse practical problems the decision fosters. The decision hampers the ability of all federal agencies to invoke their delegated pre-emption power, particularly when the

agency does so by declaratory order. The ability to pre-empt inconsistent state law is an essential regulatory tool for federal agencies to administer effectively the complex matters that Congress has delegated to them. As a result of the decision below, agencies will now be unable to pre-empt state common law at least in Georgia, Alabama and Florida. Moreover, the decision essentially proscribes federal agencies from issuing any type of declaratory pre-emption order, and instead requires the agency to institute a rulemaking procedure or to wait until the issue is presented in an agency adjudication.

While the decision limits the power and efficiency of all federal agencies, the practical problems are particularly acute with the FCC and its effort to administer Section 315. This holding will produce the multiplicity of lawsuits and inconsistent interpretations of Section 315 that the FCC's Ruling was specifically intended to prevent. Indeed, the court of appeals expressly encouraged candidates to "seek judicial relief." App. 13a. Candidates have already done so, by reinstating at least one lawsuit, and they have threatened additional litigation. As a result of the Eleventh Circuit's ruling, the court in each such lawsuit will be required independently to examine whether such suits are in fact pre-empted. The rulings that have been issued on the pre-emption question are already conflicting. Compare *Dickinson* v. *Cosmos Broadcasting*, No. CV-91-67-P (Ala. Cir. Ct. Montgomery Cty. Sept. 23, 1991) (rejecting statutory pre-emption and according no deference to the FCC) with *Wilson* v. *A.H. Belo Corp.*, No. Civ. S-91-1206 (E.D. Cal. filed Apr. 27, 1992) (dismissing for lack of jurisdiction because of FCC's pre-emption order), *appeal pending*, Nos. 92-16040, 92-16576 (9th Cir.).

Where, as in the *Dickinson* case, courts find that there is no statutory pre-emption, the suits will proceed to the merits of the claim and the courts will undertake to interpret the lowest unit charge provision in Section

315(b). Given the complexity and arcane nature of the lowest unit charge issue, these courts will invariably disagree about the proper interpretation of the lowest unit charge provision, resulting in inconsistent interpretations of Section 315(b). This potential for inconsistency will complicate the FCC's tasks and will subject broadcasters to greater risks of litigation and expose them to even greater potential liability because candidates normally add claims for punitive damages. Again, as the FCC found in its Declaratory Ruling, these inconsistent rulings will create enormous disincentives for broadcasters to accept advertising from candidates for public office, particularly with respect to state and local candidates who have no statutorily mandated rights of access to broadcast facilities. See 47 U.S.C. § 312(a)(7). These perverse incentives are exacerbated by the inherently interstate character of broadcasting. Consider, for example, a station in the District of Columbia, which, after the Eleventh Circuit's holding, may be required to ascertain and then abide by interpretations of Section 315(b) by the FCC and the States of Virginia, Maryland, and West Virginia and the District of Columbia. The broadcaster's only rational response to this situation is to limit the number of political advertisements it accepts.[12] Thus, the essential purpose of Section 315(b) will be severely undermined by the decision below.

The effects of this inconsistency and uncertainty will have an immediate impact because of the upcoming 1996 elections. It is therefore important that the FCC's ability to pre-empt state law causes of action arising under Sec-

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[12] The uncertainty harms candidates as well. As the FCC recognized in the Declaratory Ruling, "inconsistencies in the enforcement of Section 315(b) would leave [] candidates . . . unsure of their . . . rights" under the lowest unit charge provision. App. 46a. Because candidates would be unable to obtain "prompt, authoritative quotes for the lowest unit charge available to them," they would lack the "critical certainty" that "they are indeed receiving the lowest unit charge." *Id.* at 46a-47a.

tion 315 be decided now. The lowest unit charge requirement applies only in the time period immediately preceding a primary or general election, and as a result, most interpretative questions concerning the lowest unit charge arise in a cluster during those time periods. In particular, in the days preceding an election, the FCC normally resolves on an informal basis last-minute disputes regarding the lowest unit charge requirement. Because the FCC's exclusive authority has been called into question, these emergency disputes may also require resolution by state and federal courts. Without review by this Court, the 1996 elections will be managed in an atmosphere of uncertainty. Accordingly, the Court should grant the petition in order to review the propriety of the FCC's Declaratory Ruling.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 26, 1996

APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 92-8777

ZELL MILLER, Zell Miller for Governor, PIERRE HOWARD, Georgians for Howard '90, JOHNNY ISAKSON, Johnny Isakson for Governor, ANDREW YOUNG, Young Working for Georgia, LAUREN MCDONALD, Lauren McDonald for Governor, ROY BARNES, Roy Barnes for Governor, TIM RYLES, Tim Ryles for Insurance Commissioner, WARREN EVANS, Warren Evans Election Committee, WILLIAM L. DICKINSON, Second District Campaign Committee, WILLIAM J. CABANISS, Friends of Bill Cabaniss Committee, SPENCER T. BACHUS, III, Bachus for Attorney General Committee, JOHN TEAGUE, JAMES E. FOLSOM, JR., JIM FOLSOM, JR., for Lieutenant Governor Committee, FOB JAMES, Fob James for Governor Committee, KENNETH D. WALLIS, Alabamians for Ken Wallis Committee, GEORGE D.H. MCMILLAN, JR., The McMillan Committee, GEORGE WALLACE, JR., Wallace for Treasurer Committee, CHARLES A. GRADDICK, Graddick for Governor Committee, WILLIAM J. BAXLEY, Friends of Bill Baxley, PAUL HUBBERT, RICHARD SHELBY, DON SIEGELMAN, JIMMY SULLIVAN, SONNY HORNSBY, Friends of E.C. Sonny Hornsby, MARK KENNEDY, Judge Mark Kennedy for Supreme Court and Friends of Judge Mark Kennedy, CANDIDATES for PUBLIC OFFICE in GEORGIA and ALABAMA and THEIR RESPECTIVE CAMPAIGN COMMITTEES,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent,

CAPITAL CITIES/ABC, INC., CHRIS-CRAFT INDUSTRIES, INC., THE TIMES MIRROR COMPANY, AMERICAN FAMILY BROADCAST GROUP, INC., ALLBRITTON COMMUNICATIONS COMPANY, CBS, INC., CHRONICLE PUBLISHING CO., FOX TELEVISION STATIONS, INC., GILLETT BROADCASTING of CALIFORNIA, INC., GILLETT COMMUNICATIONS OF SAN DIEGO, INC., GREAT AMERICAN TELEVISION AND RADIO COMPANY, INC., KELLY BROADCASTING COMPANY, KELLY TELEVISION COMPANY, LIN TELEVISION CORPORATION, MCGRAW-HILL BROADCASTING COMPANY, INC., MIDWEST TELEVISION, INC., NATIONAL BROADCASTING COMPANY, INC., THE NEW YORK TIMES COMPANY, POST-NEWSWEEK STATIONS, INC., THE PROVIDENCE JOURNAL COMPANY, THE SPARTAN BROADCASTING COMPANY, TRIBUNE BROADCASTING COMPANY, WESTINGHOUSE BROADCASTING COMPANY, INC., WKRG-TV, INC., WTVT, INC., MEREDITH CORPORATION, A.H. BELO CORPORATION, COSMOS BROADCASTING CORPORATION, COX ENTERPRISES, INC., NATIONAL ASSOCIATION OF BROADCASTERS (NAB),
Intervenors.

Petition for Review of Decision and Order of the Federal Communications Commission (Georgia Case).

Sept. 29, 1995

Before TJOFLAT, Chief Judge, KRAVITCH, Circuit Judge, and CLARK, Senior Circuit Judge.

TJOFLAT, Chief Judge:

This case involves a challenge to the Federal Communications Commission's (the "FCC" or "Commission") interpretation of section 315(b) of the Communications Act of 1934, 47 U.S.C. § 315(b), which establishes a limit on the amount that a broadcast station may charge a political candidate for campaign advertisements—the lowest unit charge. Petitioners, twenty-five candidates for various public offices in Georgia and Alabama along with their campaign committees, seek review of a declaratory ruling by the FCC concluding that federal law preempts all state causes of action that require, as a condition of granting relief, a determination of the lowest unit charge under section 315(b) and that the FCC is the exclusive forum for adjudicating section 315(b) liability determinations. The FCC and the United States as respondents, joined by a group of broadcast station licensees, their parent corporations, and a national association representing broadcasters as intervenors, defend the issuance of the declaratory ruling as within the agency's delegated powers. We conclude that the issue presented by petitioners constitutes a hypothetical question rather than an actual case or controversy. Based on the constitutional prohibition against advisory opinions, we cannot decide this hypothetical question.

I.

A.

Section 315 of the Communications Act establishes certain requirements governing broadcast station licensees' treatment of candidates for public office. Section 315(a) requires that, subject to enumerated exceptions, licensees provide equal opportunities to all legally qualified candidates for a particular public office and prohibits censorship of candidate broadcasts. 47 U.S.C. § 315(a). The pro-

vision at issue in this case, section 315(b), regulates broadcast media rates as follows:

> The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election to such office shall not exceed—
>
> > (1) during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period; and
> >
> > (2) at any other time, the charges made for comparable use of such station by other users thereof.

Id. § 315(b). Section 315(b)(1) is commonly known as the "lowest unit charge" provision. Section 315(c) defines relevant terms, and section 315(d) states that "[t]he Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section." *Id.* §§ 315(c), (d).

The comparable use requirement of section 315(b) was enacted as part of the Communications Act Amendments of 1952, Pub.L. No. 82-554, § 11, 66 Stat. 711, 717 (codified as amended at 47 U.S.C. § 315(b)(2)), to prevent broadcast licensees from charging political candidates higher rates than those charged to commercial advertisers.[1] S.Rep. No. 96, 92d Cong., 2d Sess. 22

[1] Although the FCC's declaratory ruling focuses almost exclusively on the lowest unit charge provision of § 315(b)(1) rather than on the comparable use requirement of § 315(b)(2), we note that the rationale underlying the ruling would also apply in the comparable use context.

(1971), *reprinted in* 1972 U.S.C.C.A.N. 1773, 1775. The lowest unit charge provision was added by the Federal Election Campaign Act (FECA) of 1971, Pub.L. No. 92-225, § 103(a)(1), 86 Stat. 3, 4 (1972) (codified as amended at 47 U.S.C. § 315(b)(1)), which had the dual purpose of reducing the costs of campaigns and increasing candidates' access to the broadcast media. S.Rep. No. 96, at 20, *reprinted in* 1972 U.S.C.C.A.N. at 1774.

B.

Since shortly after the enactment of the lowest unit charge provision, the FCC has promulgated various regulations regarding the determination of the lowest unit charge, including two "political primers" dealing with all political programming requirements as well as notices dealing exclusively with section 315(b)(1). *See, e.g., Use of Broadcast and Cablecast Facilities by Candidates for Public Office,* 34 F.C.C.2d 510 (1972); *The Law of Political Broadcasting and Cablecasting,* 69 F.C.C.2d 2209 (1978); *Political Primer 1984,* 100 F.C.C.2d 1476 (1984); *Licensees and Cable Operators Reminded of Lowest Unit Charge Obligations,* 4 F.C.C.R. 3823 (1988). These FCC issuances describe broadcast station licensees' obligations under section 315(b), dictate how those obligations affect certain advertisement sales practices in the broadcast industry, and illustrate the appropriate determination of the lowest unit charge. The FCC codified its political programming policies in a separate report and order, which was adopted contemporaneously with the ruling at issue in this case. *See Codification of the Commission's Political Programming Policies,* 7 F.C.C.R. 678 (1991); *see also Codification of the Commission's Political Programming Policies,* 7 F.C.C.R. 4611 (1992) (memorandum opinion and order on reconsideration).

On October 10, 1991, the FCC released a public notice stating that "[t]he Commission is considering issuing on its own motion a declaratory ruling confirming its earlier

conclusion that it has exclusive jurisdiction to determine questions of liability for violations of Section 315(b) of the Communications Act." *Notice of Intention to Issue Declaratory Ruling With Respect to Exclusive Authority of FCC to Determine Whether Broadcasters Have Violated Lowest Unit Charge Requirement of Section 315(b)*, 6 F.C.C.R. 5954 (1991). The notice also indicated that the Commission was considering "preempt[ing] any cause of action in which an alleged violation of Section 315(b) is an essential element." *Id.* As the impetus for the FCC's action, the notice cited inconsistent decisions in state and federal court litigation [2] brought by candidates alleging overcharging by broadcast stations. The Commission commented that "[t]his exclusive jurisdiction over Section 315(b) liability determinations, moreover, *must be recognized by both federal and state courts.*" *Id.* at 5955 n. 7 (emphasis added). The FCC requested comments as to whether its jurisdiction over section 315(b) is exclusive and whether the Commission should declare that all causes of action based on section 315(b) violations are preempted. *Id.* at 5954.

The FCC followed this notice with a declaratory ruling adopted December 12, 1991, which stated:

> By this ruling the Federal Communications Commission declares that any state cause of action dependent on any determination of the lowest unit charge under Section 315(b) of the Communications Act, or some other duty arising under that subsec-

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[2] The FCC cited the following two decisions from federal district courts as examples of inconsistent results: *Zell Miller for Governor v. Pacific & Southern Co.*, No. 1:91-CV-267-RLV (N.D.Ga. June 4, 1991) (granting defendant broadcaster's motion to dismiss after holding that plaintiffs had no implied right of action under § 315(b)), *vacated as moot*, No. 91-8561 (11th Cir. Dec. 28, 1992), and *Dickinson v. Cosmos Broadcasting Co.*, No. 91-T-072-N (M.D. Ala. Apr. 1, 1991) (remanding the case to the state court after concluding that there was no federal question at issue).

> tion, is preempted by federal law. The sole forum for adjudicating such matters shall be this Commission.

Exclusive Jurisdiction With Respect to Potential Violations of the Lowest Unit Charge Requirements of Section 315(b) of the Communications Act of 1934, as amended, 6 F.C.C.R. 7511 (1991). In addition, the FCC announced that state causes of action based on section 315(b) violations filed in federal district court under diversity jurisdictions are preempted. *Id.* at 7520 n. 8. The Commission limited the scope of the ruling by concluding that "[o]ther claims, such as standard breach of contract actions, not dependent upon the determination of the lowest unit charge or some other duty arising under Section 315(b) are not preempted." *Id.* at 7511. The ruling also established procedures for filing complaints with the Commission's Mass Media Bureau regarding alleged section 315(b) violations. *Id.* at 7513-14.

To justify its preemption decision, the Commission stated that Congress had preempted the relevant causes of action by implication because: (1) the purpose and character of the federal law revealed an intent to preempt; (2) potentially inconsistent interpretations of federal law could result from state court litigation; and (3) state causes of action would create an obstacle to fulfilling Congress' objectives under the federal statute. *Id.* at 7511. The FCC also relied on its broad rulemaking authority under section 315(d), as well as that of sections 4(i) and 303(f) of the Communications Act, 47 U.S.C. §§ 154(i) & 303(f), as evidence of Congress' intent to preempt state court actions. *Id.* at 7512. Moreover, the FCC concluded:

> [R]egardless of whether *Congress*—either explicitly or by implication—has preempted state law claims based upon violations of Section 315(b), the Commission itself has authority to preempt such claims. Substantial judicial precedent makes clear that an

> agency may preempt state action under the Supremacy Clause whether or not an intention to preempt can be found in the governing statute or its legislative history.

Id. (citing *Fidelity Fed. Sav. & Loan v. de la Cuesta*, 458 U.S. 141, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982)).

In an order adopted on May 14, 1992, the FCC denied two petitions for reconsideration filed by the petitioners in this case. *Exclusive Jurisdiction With Respect to Potential Violations of the Lowest Unit Charge Requirements of Section 315(b) of the Communications Act of 1934, as amended*, 7 F.C.C.R. 4123 (1992) (order on reconsideration). The Commission rejected all of the arguments raised in the petitions for reconsideration, which are essentially the same as the arguments petitioners advance before this court.

II.

A.

Petitioners assert that this court has jurisdiction to review the declaratory ruling under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1). Section 402(a) provides that:

> Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of title 28.

47 U.S.C. § 402(a).[3] Section 2342(1) states that:

> The court of appeals . . . has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

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[3] Section 402(b) specifies that certain FCC decisions, such as those involving licenses or permits, must be appealed to the Court of Appeals for the District of Columbia Circuit. 47 U.S.C. § 402(b).

> (1) all final orders of the Federal Communication Commission made reviewable by section 402(a) of title 47. . . .

28 U.S.C. § 2342(1).

Before addressing the constitutional considerations affecting whether this court has jurisdiction over petitioners' challenge, it is necessary to characterize appropriately the FCC action. The Commission's declaratory ruling—that Congress (or the Commission itself) has preempted the jurisdiction of state courts and federal district courts, in diversity cases, when the candidate claims that the broadcaster's rates exceeded the lowest unit charge—is not a regulation promulgated pursuant to section 315(d). Unlike the regulations found at 47 C.F.R. §§ 73.1942, 76.206 (1994), the ruling does not define relevant statutory terms, dictate the use of certain industry practices, or prescribe appropriate methods for calculating the lowest unit charge. Furthermore, the declaratory ruling is not an adjudication of a pending case involving a dispute between a candidate and a broadcast station licensee. It is not a decision, a letter of admonition, or an order levying a penalty of forfeiture, a loss of operating authority, or a refund to the candidate. Because it is axiomatic that Congress has not delegated, and could not delegate, the power to any agency to oust state courts and federal district courts of subject matter jurisdiction, the FCC's declaratory ruling amounts to an agency opinion—a pronouncement interpreting the Communications Act to the effect that Congress impliedly abolished state and federal court jurisdiction over lowest unit charge violations.[4]

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[4] The FCC's action in this case is thus distinguishable from prior cases involving the preemptive effect of the Communications Act in other contexts. *See. e.g., City of New York v. FCC,* 486 U.S. 57, 108 S.Ct. 1637, 100 L.Ed.2d 48 (1988) (upholding the preemptive effect of FCC regulations that conflicted with local regulations regarding technical standards for cable television); *Farmers Educ. & Coop. Union of Am. v. WDAY, Inc.,* 360 U.S. 525, 79

B.

Petitioners challenge the declaratory ruling based on the following arguments: (1) there can be no preemption by implication from the legislative scheme because section 315(b)(1) was enacted as part of the Federal Election Campaign Act, rather than as one of the Communications Act Amendments, and thus the relevant legislative scheme is FECA rather than the Communications Act; (2) the doctrine of primary jurisdiction would provide sufficient uniformity and allow the FCC to determine whether lowest unit charge violations have occurred without completely removing cases from federal and state courts; (3) the FCC cannot grant adequate relief for section 315(b)(1) violations because the relevant provisions of the Communications Act do not authorize the FCC to order refunds of overcharges; (4) the ruling impermissibly removes federal question jurisdiction from an Article III court; and (5) the power to preempt state law claims is not within the authority delegated by Congress to the FCC.

To support the Commission's power of preemption in this context, respondents and intervenors repeat many of the rationales from the declaratory ruling, including the following: (1) federal law occupies the field; (2) state activity in this area would frustrate uniform enforcement and create inconsistent interpretations of the statute, thereby harming the goal of increased candidate access to the broadcast media; (3) the complexity of determining lowest unit charge violations requires the expertise of the FCC; (4) the FCC has broad enforcement authority

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S.Ct. 1302, 3 L.Ed.2d 1407 (1959) (holding that § 315(a)'s prohibition on censorship preempts state libel suits arising from broadcasts by political candidates); *KVUE, Inc. v. Moore*, 709 F.2d 922 (5th Cir.1983) (upholding preemption of a state statute mandating use of the lowest unit charge on a year-round basis rather than only within the 45- to 60-day period before a primary or an election), *aff'd mem.*, 465 U.S. 1092, 104 S.Ct. 1580, 80 L.Ed.2d 114 (1984).

under section 315(d) and broad remedial powers under other provisions of the Communications Act; and (5) adjudication at the FCC is the exclusive remedy for lowest unit charge violations because section 315(b) provides no implied right of action.

C.

Section 315(b) addresses situations in which candidates enter into contracts with broadcast stations for the purchase of airtime for political advertisements; the statutory language requires that the price stated in the contract "shall not exceed . . . the lowest unit charge."[5] Essentially, petitioners ask this court to declare whether, at some future date, a candidate may bring a breach of contract action in state court[6] contending that a broadcaster's rates exceeded the lowest unit charge and seeking recovery of the overcharge.[7] The question facing the court in such a case would be whether Congress has foreclosed the power of the state court to entertain that suit. Petitioners invite us to decide whether the state court would have to dismiss the candidate's claim on the broadcaster's motion or sua sponte for want of subject matter jurisdiction. By asking this court to decide what another court should do in a future case, petitioners are posing

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[5] This implicit adoption of section 315(b)'s lowest unit charge obligation is analogous to statutes requiring that contracts, such as insurance policies, contain certain provisions.

[6] Petitioners also ask whether a candidate could sue in federal district court under diversity jurisdiction. Our references herein to suits in state court include diversity suits in federal district court.

[7] In such a suit, the lowest unit charge determination would be a question of fact. Absent the presence of FCC regulations governing the determination of the lowest unit charge, the court would simply look to the statute for guidance. Otherwise, the court, pursuant to the Supremacy Clause, would apply the FCC regulations.

a hypothetical question, the answer to which would be an advisory opinion.

Article III of the Constitution limits the jurisdiction of the federal courts to actual "cases" or "controversies." Although "those two words have an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government," the purpose of the requirement is readily apparent—to limit the federal courts to deciding issues presented in an adversary framework amenable to judicial resolution and to maintain separation of powers among the three branches of government. *Flast v. Cohen,* 392 U.S. 83, 94-95, 88 S.Ct. 1942, 1949-50, 20 L.Ed.2d 947 (1968); *see also Graham v. Butterworth,* 5 F.3d 496, 498-99 (11th Cir.1993), *cert. denied,* —— U.S. ——, 114 S.Ct. 2136, 128 L.Ed.2d 866 (1994). The prohibition on advisory opinions is a logical corollary of the case or controversy requirement. "Thus, no justiciable controversy is presented . . . when the parties are asking for an advisory opinion. . . ." *Flast,* 392 U.S. at 95, 88 S.Ct. at 1950.

These Article III requirements apply with the same stringency in the administrative law context. *See Region 8 Forest Serv. Timber Purchasers Council v. Alcock,* 993 F.2d 800, 804 (11th Cir.1993) ("[T]he 'case or controversy' requirement is of special importance in cases where a federal court is being asked to rule on the legality of an act of the executive branch."), *cert. denied,* —— U.S. ——, 114 S.Ct. 683, 126 L.Ed.2d 651 (1994); *New Jersey Speech-Language-Hearing Ass'n v. Prudential Ins. Co.,* 724 F.2d 383, 385 (3d Cir.1983) ("Parties seeking to challenge administrative actions must satisfy the constitutional prerequisites derived from the 'case or controversy' clause of Article III, as well as a set of prudential requirements adopted by the courts. . . ."); *see also R.T. Vanderbilt Co. v. Occupational Safety & Health Review Comm'n,* 708 F.2d 570, 574 (11th Cir.1983) (prohibition on advisory opinions); *Alabama Power Co. v.*

FERC, 685 F.2d 1311, 1314-15 (11th Cir.1982) (ripeness), *cert. denied*, 463 U.S. 1230, 103 S.Ct. 3573, 3574, 77 L.Ed.2d 1415 (1983); *Branton v. FCC*, 993 F.2d 906, 909 (D.C.Cir.1993) (standing), *cert. denied*, —— U.S. ——, 114 S.Ct. 1610, 128 L.Ed.2d 338 (1994). Federal courts simply are not permitted to render advisory opinions regarding agency pronouncements. *See, e.g., Town of Deerfield v. FCC*, 992 F.2d 420, 429 (2d Cir.1993) ("[T]he Commission plainly has no power to request or require such a court to render an opinion that is merely advisory."); *City of Peoria v. General Elec. Cablevision Corp. (GECCO)*, 690 F.2d 116, 120 (7th Cir.1982) (A party "cannot simply put to the district court the abstract question whether [a rule] is valid, for it cannot receive an advisory opinion from a federal court."); *American President Lines v. Federal Maritime Bd.*, 112 F.Supp. 346, 348 (D.D.C.1953) ("The courts may not pass upon the legality of official action merely because some one desires a judicial opinion on the subject."). Consequently, we are prohibited from determining the propirety of the FCC's declaratory ruling given the abstract circumstances in which this issue is presented.

It should be obvious from the foregoing discussion that our refusal to answer the question petitioners pose will not preclude them from obtaining an answer. Any of them who have been or may in the future be overcharged by a broadcaster while running for public office may seek judicial relief. In such a case, the court can determine whether Congress, in enacting section 315(b), has foreclosed the courts from granting relief by giving the Commission exclusive jurisdiction to adjudicate overcharge disputes. Because we conclude that no case or controversy is presented, we DISMISS the petition for review.

IT IS SO ORDERED.

APPENDIX B

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

IN RE: EXCLUSIVE JURISDICTION WITH RESPECT TO POTENTIAL VIOLATIONS OF THE LOWEST UNIT CHARGE REQUIREMENTS OF SECTION 315(b) OF THE COMMUNICATIONS ACT OF 1934, as amended

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ORDER ON RECONSIDERATION

Adopted: May 14, 1992; Released: June 12, 1992

By the Commission: Commissioner Quello issuing a statement.

I. INTRODUCTION

1. In this Order, we deny two petitions for reconsideration of our *Declaratory Ruling* in this proceeding.[1] In that decision, we held that federal law preempts state causes of action dependent on any determination of the "lowest unit charge" under Section 315(b) of the Communications Act, or of some other duty arising under that subsection.[2] Petitions for reconsideration were filed jointly

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[1] 6 FCC Rcd 7511 (1991).

[2] Section 315(b) provides that a broadcast station's charges for advertising time purchased by candidates for political office during certain specified periods before primary and general elections may not exceed "the lowest unit charge of the station for the same class and amount of time for the same period." At all other times, the charges to such candidates may not exceed "the charges made for comparable use of such station by other users." 47 U.S.C. § 315(b). Section 315(b) applies both to over-the-air broadcast stations and cable system operators. *See* 47 U.S.C. § 315(c). The terms "broadcast stations," "broadcasters," or "licensees," as used in this document, are thus meant to include cable operators as well.

by certain candidates for public office in Georgia and Alabama and their respective campaign committees. In denying the petitions, we affirm in its entirety the holding of the *Declatory Ruling* and the analysis set forth therein.

II. BACKGROUND

2. We issued the *Declaratory Ruling* in conjunction with our comprehensive examination of Commission guidelines and regulatory policies regarding broadcaster and cable operator practices with respect to the sale of political programming and advertising time to political candidates.[3] Our decision to consider issuing a declaratory ruling regarding Section 315(b) was prompted by litigation in several states where candidates for elective office had sued broadcast stations for charging rates allegedly in excess of those permitted under Section 315(b) and the inconsistent court rulings with regard to jurisdiction resulting from such litigation. Accordingly, we issued a *Public Notice* in October 1991 stating that we were considering issuing, on our own motion, a declaratory ruling confirming that the Commission has exclusive jurisdiction to determine questions of liability for violations of Section 315(b) and inviting public comment on several related issues.[4]

3. After examining comments filed by interested persons in response to the *Public Notice*, we issued the *Declaratory Ruling* on December 13, 1991,[5] preempting "any state cause of action dependent on any determination of the lowest unit charge under Section 315(b) of the Communications Act, or of some other duty arising

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[3] *See Codification of the Commission's Political Programming Policies*, MM Docket No. 91-168, 7 FCC Rcd 678 (1991), *Erratum*, 7 FCC Rcd 920 (M.M.B. 1992), *reconsidered in part*, 7 FCC Rcd 1616 (1992), *further reconsideration*, FCC 92-210 (adopted May 14, 1992).

[4] 6 FCC Rcd 5954 (1991), 56 Fed. Reg. 51895 (Oct. 16, 1991).

[5] A summary of the *Declaratory Ruling* was published in the *Federal Register* on January 14, 1992. 57 Fed. Reg. 1478 (1992).

under that subsection. . . ." [6] We further declared that "[t]he sole forum for adjudicating such matters shall be this Commission." [7] The preemption encompassed both determinations of liability under Section 315(b) and remedies for enforcing the statute.[8] Additionally, we established procedures governing complaints against broadcast stations filed with the Commission alleging violations of the lowest unit charge requirements of Section 315(b).[9]

4. Petitioners filed the instant petitions for reconsideration on January 15, 1992. We published public notice of the petitions in the *Federal Register* [10] and established a pleading cycle in accordance with Section 1.429 of our rules.[11] Oppositions were filed by three groups of broadcasters, and the petitioners replied.[12]

III. DISCUSSION

5. Petitioners maintain that the Commission erroneously concluded that Congress by implication preempted state causes of action which include as an element alleged violations of Section 315(b). Petitioners further contend that the Commission lacks authority to confer upon itself exclusive jurisdiction over matters related to Section 315(b). Finally, petitioners assert that the procedures established by the Commission are not

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[6] *Declaratory Ruling*, 6 FCC Rcd at 7511, para. 1.

[7] *Id.*

[8] *Id.*, 6 FCC Rcd at 7513, paras. 17-19.

[9] *Id.*, 6 FCC Rcd at 7513-14, paras. 21-25.

[10] 57 Fed. Reg. 6121 (Feb. 20, 1992).

[11] 47 C.F.R. § 1.429 (1991).

[12] A list of persons joining in the petitions for reconsideration and the oppositions is attached as an appendix. Further references herein to "petition" or "petitioners" refer to the petition filed by Zell Miller *et al.*, since the petition filed by Sonny Hornsby *et al.* offers no separate substantive arguments but rather adopts, incorporates and joins the Zell Miller pleading.

adequate to enforce the rights of candidates and would stand as an obstacle to the realization of the full objectives of Congress in enacting Section 315(b). Accordingly, petitioners seek reconsideration and withdrawal of the *Declaratory Ruling*. We consider and reject petitioners' arguments below.

A. Preemption of State Causes of Action Involving Breaches of Duties Arising Under Section 315(b)

1. Congressional Preemption

6. Our preemption ruling was based, first, on a finding that Congress by implication preempted state causes of action dependent on any determination of the lowest unit charge under Section 315(b), or of some other duty arising under that subsection. Specifically, we found that: (1) the purpose of the federal law and the character of its obligations reveal a congressional intention to preempt such causes of action; (2) allowing such actions to proceed in state courts would result in potentially inconsistent interpretations of federal law; and (3) such actions would stand as an obstacle to the realization of the full objectives of Congress.[13] Petitioners challenge each of these findings, which we reaffirm below.

a. Congressional Intent

7. Petitioners assert that a proper analysis of congressional intent regarding preemption must focus exclusively on the Federal Election Campaign Act of 1971 ("FECA"), which enacted the current version of Section 315(b), and its legislative history. The legislative history of FECA, petitioners maintain, is silent regarding any congressional purpose to provide uniform regulation of broadcast issues by the Commission. Petitioners also contend that the legislative goals of FECA, and therefore Section 315(b), are different from those of the Com-

[13] *Declaratory Ruling*, 6 FCC Rcd at 7511-12, paras. 7-8.

munications Act of 1934. The basic thrust of petitioners' argument is that the Commission improperly examined Section 315(b) in the context of the general regulatory scheme adopted by the Communications Act of 1934 rather than relying solely on the purposes and objectives of FECA and its legislative history.[14]

8. We are not persuaded by this argument. Petitioners, in effect, ask us to disregard a fundamental purpose of the Communications Act to provide a uniform scheme of federal regulation and enforcement over radio communications matters simply because the lowest unit charge provision of the Act was added as part of FECA. This ignores the fact that Congress elected to adopt Section 315(b) as an amendment to the Communications Act and fit it within the existing structure of that statute. We thus reject the notion that the lowest unit charge provision of Section 315(b) must be considered in isolation either from other provisions of Section 315 or other sections of the Communications Act that demonstrate congressional intent with regard to the overall scheme of broadcast regulation and the Act's enforcement. Rather, Section 315(b), which is an integral part of the comprehensive regulatory and enforcement scheme regarding broadcasting contained in the Communications Act, properly is examined within the context of the statute in which Congress chose to codify it. In this regard, we thoroughly examined in the *Declaratory Ruling* the nature and purpose of the comprehensive and centralized statutory scheme governing broadcasting set forth in the Communications Act, including the express statutory language providing that the Commission shall execute and enforce the provisions of the Act.[15] For the reasons set forth in the *Declaratory Ruling*, we affirm our prior conclusion that "the purpose of the federal law and the character of its obligations

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[14] Petition at 2-5.

[15] 6 FCC Rcd at 7511-12, paras. 7-8 (citing, among other statutory provisions, Section 315(d) of the Act).

reveal an intention to preempt [state] causes of action" involving alleged violations of Section 315(b).[16]

9. We agree with petitioners that the legislative history and statutory objectives of FECA also are relevant to the preemption analysis; however, as we found in the *Declaratory Ruling*, they too support our decision to preempt. In this regard, we discussed in the *Declaratory Ruling* relevant portions of FECA's legislative history. For example, we cited language from the Senate report revealing that Congress expressly relied upon the assurances of the then-Chairman of the FCC that the "broadcast provisions" of FECA would be enforceable by the Commission.[17] Congress's reliance on this statement indicates its clear understanding that the Commission would be the body reponsible for enforcing Section 315(b). Moreover, by ensuring uniform interpretation and enforcement of Section 315(b), preemption will further the expressed objectives of Congress in enacting FECA—"to give candidates for public office greater access to the media" and "to halt the spiraling cost of campaigning for public office."[18]

10. Congress also vested in the Commission explicit authority to implement and enforce the substantive re-

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[16] 6 FCC Rcd at 7511, para. 7.

[17] *Declaratory Ruling*, 6 FCC Rcd at 7512, para. 8 n.17 (citing S. Rep. No. 96, 92d Cong., 1st Sess. (1971), *reprinted in* 1972 U.S. Code Cong. & Ad. News 1773, 1786). Petitioners assert that this passage from the Senate report is considered out of context and refers to the spending limitations contained in the legislation rather than Section 315(b). Petition at 9-10. The Commission's Chairman, however, was referring to enforcement of the legislation's *broadcast provisions*, of which the lowest unit charge requirement of current Section 315(b) was an integral part. There would have been no reason for the Commission's Chairman to testify about FECA's spending limitations, because the Commission has no jurisdiction over those provisions.

[18] *See Declaratory Ruling*, 6 FCC Rcd at 7512, para. 14 (quoting S. Rep. No. 96, 92d Cong., 1st Sess. (1971), *reprinted in* 1972 U.S. Code Cong. & Ad. News at 1774).

quirements of Section 315—authority that was not diminished in any way in the adoption of FECA.[19] As the United States Court of Appeals for the District of Columbia Circuit has noted, the authority contained in Section 315(d) "amounts to a congressional direction to the FCC to recognize the importance of this particular section of the statute and to prescribe separate rules and regulations to deal with the multitudinous situations that arise in applying it to all federal, state and local candidates for office throughout the nation."[20] This explicit grant of enforcement authority reinforces our conclusion that Congress intended the Commission, and not the many state courts, to resolve any issues concerning the lowest unit charges for the broadcast of political advertisements.

11. We reject petitioners' claim that because the language of Section 315(d) was enacted prior to the lowest unit charge requirement of Section 315(b), subsection (d) does not reveal any congressional intent with respect to subsection (b).[21] Petitioners once again ignore the context of the statute and unpersuasively suggest that we view separate subsections of Section 315 in isolation. By placing the lowest unit charge requirement in Section 315, Congress clearly intended the existing Rule Making authority contained in subsection (d) to apply to subsection (b),[22] and petitioners have cited nothing that suggests otherwise. Moreover, the lowest unit charge requirement was merely a change in the standard for measuring the

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[19] *See* 47 U.S.C. § 315(d) (directing the FCC to "make rules and regulations to carry this provision [Section 315] into effect."); *Declaratory Ruling*, 6 FCC Rcd at 7512, paras. 8, 11.

[20] *Kay v. FCC*, 443 F.2d 638, 643-44 (D.C. Cir. 1970).

[21] *See* Petition at 8-9.

[22] *See* Sutherland Stat. Const. § 22.34 (4th Ed.) (amendment should be construed together with unchanged provisions of original section); *id.* at § 22.35 (amendment should be construed as if part of original enactment).

lawfulness of charges for political advertisements. Section 315(b) itself existed long before Congress enacted FECA. Prior to the FECA amendment, that provision limited the rates for political advertising to "the charges made for comparable use of such station for other purposes." [23] There is no basis for concluding that in amending that standard in Section 315(b) to include the "lowest unit charge" concept, Congress in the FECA intended to deprive the Commission of its existing authority under Section 315(d) to enforce all the substantive requirements of Section 315. Indeed, in our view, the explicit enforcement authority contained in Section 315(d) is strong evidence of Congress's intent to provide for uniform implementation and enforcement of subsection (b).

12. Similarly, we reject petitioners' assertion that we improperly relied on *Belluso v. Turner Communications Corp.*[24] to support our conclusion that Congress by implication preempted state causes of action involving breaches of duties arising under Section 315(b).[25] As we noted in the *Declaratory Ruling*, in *Belluso* the court held that Congress had not intended to create a private federal cause of action for damages as a remedy for a violation of Section 315(a) of the Communications Act and had opted instead for an exclusive administrative remedy.[26] Petitioners claim that *Belluso* is distinguishable because Section 315(a) was enacted as part of the original Communications Act, whereas the lowest unit charge requirement of Section 315(b) was added to the Act through FECA. As indicated above, we find such distinctions unpersuasive. We affirm our prior conclusion that the court's reasoning in *Belluso* is equally applicable to Section 315(b).

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[23] 47 U.S.C. § 315(b) (1952).

[24] 633 F.2d 393 (5th Cir. 1980).

[25] *See* Petition at 7-8.

[26] 6 FCC Rcd at 7512, para. 8 n.17.

Whether the statutory provision involved is Section 315(a) or Section 315(b), in our view the statute reveals a congressional intention to achieve uniform implementation and enforcement through this Commission.[27]

13. Finally, we reject petitioners' claim that Section 414 of the Act, which preserves remedies "now existing at common law or by statute," [28] is inconsistent with a congressional desire to preempt state causes of action involving Section 315(b) determinations.[29] Such a "savings clause" does not preserve lawsuits that are predicated on a federal statutory right, rather than "existing" state common law.[30] A savings clause does not convert federal law claims into state causes of action.[31] Also, as we noted in the *Declaratory Ruling*, "such 'savings clauses' do not preclude preemption where allowing state remedies would lead to a conflict with or frustration of statutory purposes." [32] Moreover, the determination of whether a

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[27] As we have pointed out, moreover, Section 315(b) restricted the charges broadcasters could assess for political advertisements long before FECA was adopted.

[28] 47 U.S.C. § 414.

[29] *See* Petition at 6-7.

[30] *Zell Miller for Governor v. Pacific & Southern Co., Inc.*, No. 1:91-CV-267-RLV, slip op. at 11-12 (N.D. Ga. June 4, 1991); *Declaratory Ruling*, 6 FCC Rcd at 7513, para. 20 & n.44.

[31] *Id.*, 6 FCC Rcd at 7513, para. 20 & n.45. *See Arrow Transp. Co. v. Southern R. Co.*, 372 U.S. 658, 671 n.22 (1963); *Comtronics, Inc. v. Puerto Rico Tel. Co.*, 553 F.2d 701, 707-8 n.6 (1st Cir. 1977).

[32] *Declaratory Ruling*, 6 FCC Rcd at 7513, para. 20 & n.43 (citing *Texas & Pacific Railroad Co. v. Abilene Cotton Oil Co.*, 204 U.S. 427 (1907); *Pennsylvania Railroad v. Puritan Coal Mining Co.*, 237 U.S. 121, 129 (1915); *In re Long Distance Telecommunications Litigation*, 831 F.2d 627 (6th Cir. 1987); *Comtronics, Inc.*, 553 F.2d at 707-08 n.6 (1st Cir. 1977); *Blackburn v. Doubleday Broadcasting, Inc.*, 353 N.W.2d 550 (Minn. 1984)).

broadcaster has complied with its Section 315(b) "lowest unit charge" obligations involves resolution of "issues call[ing] for the type of administrative evaluations and conclusions that Congress has entrusted to the informed discretion of the Commission" and therefore is outside the scope of the savings clause. *See Chicago & North Western Transportation Co. v. Kalo Brick & Tile* Co., 450 U.S. 311, 330 (1981).[33] In this regard, we pointed out in the *Declaratory Ruling* that the Commission has been designated to enforce the lowest unit charge requirement "precisely because it has the expertise necessary to make such determinations based upon its understanding of the complex and often arcane practices of the broadcast industry."[34] Accordingly, we affirm our prior conclusion that Section 414 does not foreclose our preemptive action concerning Section 315(b).[35]

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[33] In *Kalo Brick*, the Supreme Court held that a state statutory remedy and certain common law causes of action for damages against a railroad carrier were preempted despite a savings clause in the Interstate Commerce Act containing language identical to that contained in Section 414 of the Communications Act.

[34] *Declaratory Ruling*, 6 FCC RCd at 7513, para. 15.

[35] Petitioners' reliance on *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976), and similar cases is misplaced. *See* Petition at 7 n.2, In *Nader*, the Supreme Court held that a common law action for fraudulent misrepresentation against an air carrier need not be stayed pending reference to the Civil Aeronautics Board for determination whether the practice is deceptive within the meaning of the Federal Aviation Act. Emphasizing that a violation of the relevant statutory provision was not coextensive with a breach of duty under the common law, the Court found no "irreconcilable conflict between the statutory scheme and the persistence of common law remedies." *Id.*, 426 U.S. at 299. Thus, in *Nader* and other cases cited by petitioners, the alleged breach of duties under state law were distinguishable from those created under federal law and involved different elements of proof. *See, e.g., Nepera Chemical, Inc. v. Sea-Land Service, Inc.*, 794 F.2d 688 (D.C. Cir. 1986); *Bruss Co. v. Allnet Communication Services, Inc.*, 606 F. Supp. 401 (N.D. Ill. 1985); *Kaplan v. ITT - US Transmission Systems Inc.*,

b. Potential for Inconsistent Interpretations

14. Petitioners next dispute our expressed concern that "[r]ulings by courts in numerous jurisdictions around the country almost certainly would produce varying and possibly conflicting determinations among state courts and between those courts and the Commission, thereby frustrating the objectives of certainty and uniformity." [36] Petitioners offer the following arguments in support of their contention that there is no danger of inconsistent interpretations of Section 315(b): (1) courts have little latitude in interpreting Section 315(b) because they act in an

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589 F.Supp. 729 (E.D. N.Y. 1984). In contrast, we held in the *Declaratory Ruling* that state causes of action are preempted to the extent they involve alleged breaches of duty under state law that are dependent on proof of a violation of some duty arising under Section 315(b). That is, unlike in *Nader*, we are dealing with causes of action for which no conceivable liability may attach under state law without the central finding of a Section 315(b) violation. Indeed, petitioners do not even attempt to demonstrate that the state causes of action they espouse are distinct from complaints of Section 315(b) violations. Petitioners acknowledge instead that their objective is to provide "a convenient [state] forum for candidates to seek redress for alleged violations of Section 315(b)." Petition at 16. Petitioners' objection to the *Declaratory Ruling* thus is based fundamentally on their view that "Congress did not intend to give the Commission exclusive jurisdiction over such [Section 315(b)] claims." Petition at 5. We accordingly conclude that *Nader* and similar cases are not controlling here.

[36] *Declaratory Ruling*, 6 FCC Rcd 7512, para. 12. We discussed this concern primarily in the context of our discussion in the *Declaratory Ruling* regarding the exercise of our independent authority to preempt in order to achieve the purpose of developing uniform standards for interpreting and enforcing Section 315(b). Furthermore, whatever the potential for inconsistent interpretations of Section 315(b), Congress centralized in the Commission implementation and enforcement authority with respect to the Communications Act generally and Section 315 specifically, and thus impliedly preempted state causes of action involving breaches of duties arising under Section 315(b).

adjudicatory, rather than a Rule Making, context; (2) the regulations governing Section 315(b) are easily understandable and applied; (3) all interpretations of Section 315(b) are subject to ultimate review by the United States Supreme Court; (4) the inclusion of a federal statute as a standard in a state cause of action is not uncommon; and (5) the doctrine of primary jurisdiction is available to ensure uniformity, if necessary.[37]

15. These arguments are not persuasive. First, the fact that state courts would make determinations under Section 315(b) in an adjudicatory rather than a Rule Making role does not diminish the possibility of disparate rulings on the issues of liability and remedies. Multiple adjudications by numerous courts could easily produce inconsistent decisions in various jurisdictions, thereby creating inconsistent rights and responsibilities for political candidates and broadcasters, respectively. In addition, contrary to petitioners' position, Congress expressly recognized in enacting current Section 315(b) that "[t]he determination of what is a broadcasting station's lowest unit charge can be a very complicated matter." [38] Our recent effort to provide comprehensive guidance in this area [39] underscores the need to centralize interpretation and enforcement of the lowest unit charge requirement of Section 315(b) in order to achieve uniformity and certainty.[40]

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[37] Petition at 10-15; Reply at 3.

[38] S. Rep. No. 96, 92d Cong., 1st Sess. (1971), *reprinted in* 1972 U.S. Code Cong. & Ad. News at 1780.

[39] *See Codification of the Commission's Political Programming Policies*, 7 FCC Rcd at 687-98, paras. 50-119; 7 FCC Rcd at 701-2 (Appendix B) (text of new rule concerning the lowest unit charge requirement to be codified at 47 C.F.R. § 73.1942).

[40] We do not suggest, of course, that state courts are incapable of resolving such "complicated" questions. Our point is that uniformity and certainty in this area are such important considerations that the entire enforcement function has been centralized in this agency. State courts could resolve lowest unit charge

16. We recognize that the Supreme Court has ultimate authority to review state court decisions, but this fact does not change our analysis.[41] As a practical matter, the Supreme Court cannot and certainly will not review a multitude of inconsistent state court decisions involving Section 315(b) determinations. Even if the Supreme Court were to review a particular state court ruling involving the lowest unit charge requirement, various other decisions by state courts would remain unaffected, or at least there could be extensive litigation and prolonged uncertainty as to whether those decisions were implicated by the Supreme Court's decision. We thus remain convinced of the potential for candidates and broadcasters to be subject to differing standards in different jurisdictions. Centralizing determinations of liability in this Commission will avoid this problem and avoid frustration of Congress's objective of ensuring uniform application and enforcement of the Act's provisions, including Section 315(b).[42]

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questions in a manner that would be perfectly reasonable in the abstract but unacceptably inconsistent with the Commission's standards for enforcement of Section 315(b).

[41] Petitioners cite *Tafflin v. Levitt*, 493 U.S. 455 (1990), and *Pan American Petroleum Corp. v. Superior Court of Delaware*, 366 U.S. 656 (1961), for the proposition that the availability of Supreme Court review of any erroneous state court decisions obviates the need for federal preemption. *See* Petition at 13. Those cases, however, involved questions of whether state courts had concurrent jurisdiction with federal courts, not, as here, whether state courts are preempted from acting in an area where Congress has given a single federal agency exclusive jurisdiction over an area of regulation. *See, e.g., FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940) (in adopting the Communications Act, Congress "formulated a unified and comprehensive regulatory system for the [broadcasting] industry" to be administered by the FCC).

[42] Final decisions of the Commission concerning Section 315(b), including this declaratory ruling, are of course subject to judicial review by the United States Court of Appeals and, ultimately,

17. We recognize, as petitioners observe, that state courts in some circumstances may be called upon to construe federal law in the context of hearing causes of action grounded in state law.[43] However, state court consideration of such matters is not permitted when Congress has preempted state law, nor when a federal agency acting within its authority has preempted state law. Since we have determined that Congress has by implication preempted state causes of action related to Section 315(b), and further, that we have independent authority to preempt such causes of action, which we have exercised,[44] state courts in this instance may not entertain determinations of liability and remedies under Section 315(b).[45]

18. We also are not persuaded by petitioners' argument that, if state court enforcement of Section 315(b)

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the United States Supreme Court. 47 U.S.C. § 402(a); 28 U.S.C. § 2342(1).

[43] *See* Petition at 13-14 & n.7.

[44] *See* Section III.A.2., *infra.*

[45] The cases cited by petitioner involving state court construction of federal statutes do not involve situations where, as here, Congress has given exclusive jurisdiction to a federal regulatory agency, and thus are inapposite. *See* Petition at 14 n.7. Moreover, in those cases the courts found that the causes of action at issue were clearly based on state law and the alleged violation of federal law was "merely one of the props" utilized to support the state law claim. *Owens v. New York Central Railroad Company*, 267 F. Supp. 252, 255 (E.D. Ill. 1967) (cause of action grounded in negligence). *See, e.g., Moore v. Chesapeake & Ohio Railway Co.*, 193 U.S. 205 (1934) (relevant cause of action based on state statute which incorporated language from similar federal statute); *Moody v. McDaniel*, 190 F. Supp. 24 (N.D. Miss. 1960) (cause of action based on state wrongful death statute); *Tri-State Motor Transit Co. v. Maclif Industries*, 534 F. Supp. 283 (S.D. Tex. 1982) (court held that cause of action may be resolved wholly in terms of principles of state common law of contract). Here, in contrast, the lawsuits at issue derive fundamentally from Section 315(b)'s lowest unit charge requirement, not from existing state common or statutory law.

implicates concerns for uniformity, we should rely instead on the doctrine of primary jurisdiction in lieu of preemption. We have determined in this case that state court jurisdiction over lowest unit charge claims has been preempted totally by federal law. Primary jurisdiction would be applicable only if *both* the state courts and the Commission had jurisdiction over lowest unit charge controversies. That doctrine is a means of accommodating concurrent jurisdiction between courts and the Commission—not a compromise situation that gives state courts jurisdiction over matters preempted by federal law. Furthermore, as the Supreme Court has noted, "[n]o fixed formula exists for applying the doctrine of primary jurisdiction." [46] There is thus no assurance that a particular court would refer the liability issue under Section 315(b) to the Commission in the first instance.[47] Moreover, we have determined that this procedure would not ensure uniform enforcement of Section 315(b), as courts would be free to fashion remedies inconsistent with those deemed appropriate by the federal agency charged with implementing and enforcing the statute. In extending the preemptive effect of the *DeclaratoryRuling* to remedies, we specifically found that allowing state courts to impose additional remedies for violations of Section 315(b) might discourage broadcasters from carrying political advertising, thereby frustrating Congress's intent to foster dissemination of information regarding political campaigns.[48] We

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[46] *United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 64 (1956).

[47] Indeed, in recent state court litigation involving Section 315(b), the court, supported by certain of the petitioners in this proceeding, refused a request by the Commission to invoke the doctrine of primary jurisdiction and defer to the agency on the issue of liability. *See Dickinson v. Cosmos Broadcasting Co.*, No. CV-91-67-P (Ala. Cir. Ct. Sept. 23, 1991). The Commission suggested a primary jurisdiction referral in that case because it had not yet considered whether state actions were preempted.

[48] *Declaratory Ruling*, 6 FCC Rcd at 7513, para. 19.

reject petitioners' suggestion that the doctrine of primary jurisdiction is an appropriate vehicle to ensure uniformity in this area.

c. State Actions as an Obstacle to the Realization of the Full Objectives of Congress

19. Finally, petitioners maintain that state actions would not stand as an obstacle to the realization of the full objectives of Congress in enacting Section 315(b), but rather would serve Congress's goal of reducing campaign spending.[49] In this regard, petitioners claim that administrative remedies available from the Commission would not be as effective because the Commission does not have authority to order that broadcasters pay refunds to candidates who are overcharged.[50]

20. Petitioners' argument ignores the breadth of the Commission's authority in this area. The Commission has a wide range of tools, including the authority to require rebates for overcharges, to ensure effective and uniform enforcement of Section 315(b). The Commission has upheld Mass Media Bureau actions in which rebates had been required and no broadcaster has ever challenged that authority.[51] Section 315(b) itself mandates that charges to candidates "shall not exceed" the lowest unit charge, and the Commission is charged with the responsibility to execute and enforce the Act's provisions.[52] In addition, Section 4(i) of the Act expressly authorizes the

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[49] Petition at 15-16.

[50] *Id.; see also* Petition at 23-24.

[51] *See, e.g., Outlet Communications, Inc.*, 5 FCC Rcd 2835 (M.M.B. 1990), *affirmed*, 7 FCC Rcd 632 (1992); *Alfa Broadcasting Corp.*, 55 RR 2d 599 (M.M.B.), *review denied*, 102 FCC 2d 18 (1984). *See also Chronicle Publishing Co.*, 6 FCC Rcd 7497, 7499 (1991) (directing licensee to advise Commission of actions taken to refund Section 315(b) overcharges); *South Arkansas Radio Company*, 5 FCC Rcd 4643, 4643 (M.M.B. 1990) (requiring rebates of Section 315(b) overcharges).

[52] *See* 47 U.S.C. § 315(d). *See also* Section 1 of the Act, 47 U.S.C. § 151.

Commission to issue such orders "not inconsistent with this Act as may be necessary in the execution of its functions."[53] Requiring broadcasters to return overcharges to candidates effectuates the express requirement of Section 315(b) and is well within the Commission's authority. The United States Court of Appeals for the District of Columbia Circuit has held in a different regulatory context that Section 4(i) authorizes the Commission to order refunds to enforce statutory requirements in the absence of express refund authority. *New England Tel. & Tel. Co. v. FCC*, 826 F.2d 1101 (D.C. Cir. 1987), *cert. denied*, 490 U.S. 1039 (1989).[54] We conclude that we may require refunds to enforce the lowest unit charge provisions of Section 315(b) pursuant to our authority under Sections 1, 4(i) and 315(d) of the Act.[55]

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[53] 47 U.S.C. § 154(i).

[54] The fact that Title III of the Act relating to broadcasters does not mirror the remedial procedures for common carriers specified in Title II, which include an express provision for damages in some circumstances, does not change our conclusion. *See* Petition at 5-6. In *New England Telephone*, the court held that, pursuant to Section 4(i), the Commission may require carriers to refund earnings in excess of a Commission-prescribed authorized rate-of-return even though refunds are not expressly authorized, and even though another part of Title II expressly permits an award of damages against carriers for other types of violations. Thus, the mere fact that one part of the Act expressly provides for damages does not justify an inference that the Commission's authority under Section 4(i) is not broad enough to permit the Commission to order refunds in other circumstances, especially where refunds are necessary in order to achieve compliance with the Act's express requirements. Petitioners' citation to TVA v. Hill, 437 U.S. 153, 188 (1978), is inapposite. Under the Endangered Species Act at issue in that case, Congress had acted to limit the reach of the statute in certain well-defined instances, and the court recognized such congressional exceptions to federal jurisdiction. In the Communications Act, in contrast, Congress has granted the Commission broad and exclusive power to implement and enforce the provisions of Section 315(b) without exceptions.

[55] Further, as we explained above in Section III.A.1.b, the prospect of differing remedies imposed by various state courts would frustrate the congressional goals of uniformity and certainty in

2. Preemption as an Exercise of the Commission's Authority

21. As an independent basis for our action, we explained that, regardless of whether Congress expressly or by implication preempted state law claims based upon alleged violations of Section 315(b), substantial judicial precedent establishes that the Commission itself has authority to preempt such claims. *See, e.g., City of New York v. FCC*, 486 U.S. 57 (1988); *Fidelity Federal Savings & Loan Ass'n. v. de la Cuesta*, 458 U.S. 141 (1982). Consistent with this precedent, we conclude that preemption was well within our delegated authority under the Communications Act to enforce Section 315(b) and was necessary to achieve our purpose of ensuring uniform standards for interpreting and enforcing the lowest unit charge requirement. Accordingly, we exercised our independent authority to preempt state causes of action invoving breaches of duties arising under Section 315(b) and declared that the Commission shall be the sole forum for adjudicating such matters.[66]

22. Petitioners argue that the Commission lacks authority to confer upon itself exclusive jurisdiction over Section 315(b) matters.[67] It is beyond dispute, of course, that "[a]n agency may not confer power upon itself." *Louisiana Public Service Commission v. FCC*, 476 U.S.

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the application and enforcement of Section 315(b) and might well impede, rather than foster, the dissemination of information regarding political campaigns favored by Congress. Moreover, we are not persuaded by petitioners' argument that our preemption decision unfairly requires candidates around the country to litigate their claims in Washington, D.C. before the Commission rather than in more convenient state courts. *See* Petition at 16; Reply at 5-6. We perceive no hardship in requiring candidates to file their complaints with the Commission in accordance with the procedures established in the *Declaratory Ruling*. We anticipate that most such claims can be adjudicated on the basis of a written record and would not require travel to Washington.

[66] *Declaratory Ruling*, 6 FCC Rcd at 7512-13, paras. 9-16.

[67] Petition at 16-20.

355, 374 (1986).[58] However, in preempting state causes of action related to Section 315(b), we are in no way conferring power upon ourselves but rather are acting pursuant to the authority granted us by Congress. As we explained in the *Declaratory Ruling*, the Communications Act's regulatory scheme setting forth Commission authority to enforce the Act, and the provisions of Section 315 specifically, provide the necessary delegation of authority to support our decision to preempt.[59] Consistent with *City of New York* and other Supreme Court decisions, the Commission may in proper circumstances determine "that its authority is exclusive and pre-empts any state efforts to regulate in the forbidden area."[60] In preempting state causes of action involving breaches of duties arising under Section 315(b) and declaring that the Commission shall be the sole forum for adjudicating such matters, we acted squarely within the authority delegated to us by Congress and in harmony with the standards enunciated by the Supreme Court in *City of New York* and related decisions.[61]

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[58] The *Louisiana* case, of course, involved statutory language in which the Court held that Congress expressly had *denied* power to the Commission to regulate the activity in question. 486 U.S. at 374. It was in that context that the Court asserted that the agency "may not confer power upon itself." Neither Section 315 nor any other provision of the Act denies the Commission power over the lowest unit charge requirement. On the contrary, the Act establishes the Commission as the enforcer of that requirement.

[59] 6 FCC Rcd at 7512, para. 11.

[60] 486 U.S. at 64 (citing *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700 (1984), and *de la Cuesta*, 458 U.S. at 152-54).

[61] Petitioners maintain that "whether a state cause of action is pre-empted by federal law is not determinative of whether judicial remedies to enforce possible federal causes of action should be foreclosed. Exclusive jurisdiction and pre-emption are two entirely different things." Petition at 18. However, we expressed the view in the *Declaratory Ruling* that Section 315(b) does not give rise to a private federal cause of action and that any federal lawsuit based directly upon allegations of violations of Section 315(b) therefore should be dismissed. 6 FCC Rcd at 7511, para. 5 n.8, and 7512, para. 8 n.17. Consistent with our expressed view, a

23. Finally, petitioners' attempts to distinguish *City of New York* and *de la Cuesta* are unavailing.[62] Petitioners maintain that, unlike the situation in those cases, here there is no conflicting state policy with respect to Section 315(b). To the contrary, as discussed above, we conclude that a multiplicity of state court rulings almost certainly would produce varying and possibly conflicting determinations among state courts and between those courts and the Commission.[63] Such a result necessarily would frustrate federal interpretation and enforcement of Section 315(b). Just as importantly, it would conflict with Congress's objective to create a unified scheme of regulation for communications by vesting in the Commission exclusive jurisdiction to enforce the Act, thereby leading to uniformity, certainty and consistency with respect to the lowest unit charge and other requirements of the Act. Additionally, inconsistent state court determinations of liability and remedies under Section 315(b) might well discourage broadcast stations from accepting political advertisements, thus frustrating a central congressional policy underlying Section 315(b) of encouraging greater and less costly access for candidates to broadcast facilities.![64] We therefore arffim our preemption decision.

B. Procedures Governing Complaints Alleging Section 315(b) Violations

24. In the *Declaratory Ruling*, we found that setting out a procedural framework for ruling on Section 315(b)

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federal district court on its own recently determined that it lacked subject matter jurisdiction over an action predicated on alleged violations of Section 315(b) and dismissed the case. *Pete Wilson v. A. H. Belo Corp.*, No. CIV S-91-1206 LKK (E.D. Cal. April 27, 1992).

[62] Petition at 19-20.

[63] *See* Section III.A.1.b., supra; *Declaratory Ruling*, 6 FCC Rcd at 7512, para. 12.

[64] *Declaratory Ruling*, 6 FCC Rcd at 7512, para. 14. *See Farmers Educational & Coop. Union v. WDAY, Inc.*, 360 U.S. 525, 534-35 (1959).

complaints "will further our ability to promptly and fairly dispose of Section 315(b) complaints brought to us as a consequence of this ruling . . . ." [65] Accordingly, we established procedures which set forth pleading requirements for making a *prima facie* case, established pleading timetables, provided for limited discovery of station records pertaining directly to the complaint, and offered parties the opportunity to pursue mediation as an alternative to adjudication of a complaint by the Mass Media Bureau.[66] As discussed below, we affirm those procedures in their entirety.

25. Petitioners contend that the procedures set forth in the *Declaratory Ruling* are inadequate because they are not the same as those afforded litigants under state law and the Federal Rules of Civil Procedure.[67] However, there is no requirement in either the Communications Act or the Administrative Procedure Act ("APA")[68] that the Commission's procedures replicate procedures available to civil litigants in state or federal courts, and petitioners offer no authority for such a proposition. Civil court procedures necessarily are drafted broadly so as to accommodate a wide variety of civil causes of action. In contrast, we are concerned here with alleged violations of a specific provision of the Communications Act. On the basis of our experience in enforcing Section 315(b), we were able to craft procedures designed expressly to facilitate resolution of such claims.[69]

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[65] 6 FCC Rcd at 7513, para. 21.

[66] *Declaratory Ruling*, 6 FCC Rcd at 7513-14, paras. 21-25.

[67] Petition at 22-23.

[68] 5 U.S.C. §§ 551-559.

[69] Petitioners also suggest that the *Declaratory Ruling* creates uncertainty as to the applicable statute of limitations for Section 315(b) complaints and "can potentially be read to shorten the amount of time which would otherwise be applicable under state law." Petition at 22. As petitioners note, however, the Commission did "not specif[y] a specific statute of limitations." *Id.* Rather,

26. We likewise reject petitioners' assertion that our Section 315(b) procedures conflict with the APA and the Commission's existing procedural rules.[70] Section 315 does not require lowest unit charge disputes to be determined "on the record after opportunity for an agency hearing."[71] The procedures governing adjudications and hearings specified in Section 554 and 556 of the APA[72] thus are not required in Section 315(b) cases. Moreover, we do not anticipate the need to hold formal adjudicatory hearings in the majority of complaints arising under Section 315(b). Petitioners' claim that our Section 315(b) procedures differ from other procedures specified in our rules is irrelevant.[73] The Commission has broad authority to establish individually tailored procedures to carry out its responsibilities under the Act, including the enforcement of Section 315.[74] In other contexts, we have crafted procedural requirements governing specific types of complaints which differ from our procedural rules governing pleadings generally or our rules governing formal hearings.[75]

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we stated "[a]s a matter of general policy" that "complainants should file lowest unit charge complaints in a timely manner." *Declaratory Ruling*, 6 FCC Rcd at 7513, para. 22 n.46. We note that licensees are accountable for their performance throughout their five-year or seven-year license terms, 47 U.S.C. § 307, and are subject to forfeitures for up to three years following a violation of the Act, 47 U.S.C. § 503. However, licensees are required by our regulations to retain political file documents only for a period of two years. 47 C.F.R. § 73.1943(c) (formerly codified at 47 C.F.R. § 73.1940).

[70] Petition at 20-22.

[71] 5 U.S.C. § 554.

[72] *See* 5 U.S.C. §§ 554, 556.

[73] *See* Petition at 20-21. Petitioners refer to existing procedural rules governing pleadings generally and other rules addressing formal hearings before administrative law judges.

[74] *See 47 U.S.C. § 315(d); see also* 47 U.S.C. §§ 154(i), (j).

[75] *See, e.g.*, 47 C.F.R. §§ 1.720-1.734 (1991) (procedures governing formal complaints brought against common carriers under

27. Contrary to petitioners' claims,[76] the procedures set forth in the *Declaratory Ruling* fully protect the rights of parties and should facilitate timely and fair resolution of such complaints, thus advancing the interests of the parties and the public interest. These procedures are tailored to address the specific factual and legal issues that arise in Section 315(b) disputes. For example, at the heart of any Section 315(b) dispute is whether the station has charged the complaining candidate the "lowest unit charge" as prescribed by the statute. Accordingly, our procedures provide for limited discovery designed to enable the candidate to examine station records directly pertaining to this issue, while protecting broadcasters from potentially harmful public disclosure of proprietary information or the identity of their advertising customers. In this manner, our procedures are designed to protect the legitimate interests of both parties to the complaint. If actual experience indicates areas where our Section 315(b) procedures should be revised, we will revisit them.[77]

IV. CONCLUSION

28. We have reviewed petitioners' arguments and conclude that they do not support reconsideration of the *Declaratory Ruling*. We thus affirm our prior ruling in its entirety, including our holding that federal law preempts state causes of action dependent on any determination of the lowest unit charge or any other duty arising under Section 315(b) of the Communications Act.

Section 208); 47 C.F.R. §§ 1.1401-1.1415 (1991) (procedures governing pole attachment complaints brought under Section 224).

[76] *See, e.g.*, Reply at 5-8.

[77] In any event, we note that the adequacy and lawfulness of our procedures governing complaints brought under Section 315(b) has no bearing on our preemption analysis set forth in Sections III.A, *supra*. Any infirmities in the Section 315(b) procedures would not justify alteration of our decision to preempt state causes of action involving breaches of duties arising under Section 315(b).

V. ORDERING CLAUSES

29. Accordingly, IT IS ORDERED, pursuant to Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405, that the petitions for reconsideration filed on January 15, 1992, by certain candidates for political office in Georgia and Alabama and their respective campaign committees ARE DENIED.

30. IT IS FURTHER ORDERED, pursuant to Sections 1, 4(i) and (j), 303(r), and 315(b) and (d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), 303(r), and 315(b) and (d); Section 5(e) of the Administrative Procedure Act, 5 U.S.C. § 556(e); and Section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, that the *Declaratory Ruling* in this proceeding IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[Separate Statement of Commissioner James H. Quello omitted in printing]

APPENDIX C

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

IN RE: EXCLUSIVE JURISDICTION WITH RESPECT TO POTENTIAL VIOLATIONS OF THE LOWEST UNIT CHARGE REQUIREMENTS OF SECTION 315(b) OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED

DECLARATORY RULING

Adopted: December 12, 1991;

Released: December 13, 1991

By the Commission: Commissioner Quello dissenting in part and issuing a statement: Commissioner Marshall issuing a statement.

1. By this ruling the Federal Communications Commission declares that any state cause of action dependent on any determination of the lowest unit charge under Section 315(b) of the Communications Act, or of some other duty arising under that subsection, is preempted by federal law. The sole forum for adjudicating such matters shall be this Commission.

BACKGROUND

2. Under Section 315(b) of the Communications Act, a broadcast station's charges for advertising time purchased for candidate uses while campaigning for political office during the last 45 days of a primary campaign or the last 60 days of a general election campaign may not exceed "the lowest unit charge of the station for the same

class and amount of time for the same period." Outside those immediate pre-election periods, the charges to such candidates may not exceed "the charges made for comparable use of such station by other users." Subsection (d) of Section 315 directs the Commission to prescribe rules to implement the statute. The Commission over the years has adopted rules, provided general guidance and issued rulings both orally and in writing in response to complaints and requests for declaratory relief in particular cases arising under Section 315(b) (as well as Sections 315(a) and 312(a)(7)). In its continuing attention to political broadcasting issues, the Commission is in the process of updating its guidelines and regulatory policies regarding current and possible future advertising practices with respect to political programming.[1]

3. In a *Public Notice* released on October 10, 1991,[2] the Commission stated that it was considering issuing, on its own motion, a declaratory ruling confirming its earlier conclusion [3] that it has exclusive jurisdiction to determine questions of liability for violations of Section 315(b). Citing litigation in several states where candidates for elective office have sued broadcast stations for charging rates allegedly in excess of those permitted under Section 315(b), and the inconsistent rulings with regard to jurisdiction that have been issued to date in such litigation, the Commission specifically sought public comment upon the following issues: (1) whether its jurisdiction to determine the lawfulness of political advertising charges is exclusive; (2) whether federal and state courts must refer the liabil-

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[1] *See Codification of the Commission's Political Programming Policies* (MM Docket No. 91-168), 6 FCC Rcd 5707 (1991). A *Report and Order* revising and codifying these policies is being adopted contemporaneously with this Declaratory Ruling.

[2] *Public Notice*, FCC No. 91-326, 6 FCC Rcd 5954 (1991), 56 Fed. Reg. 51895 (October 16, 1991) (hereinafter "Public Notice").

[3] News Release, Report No. GN-74, June 6, 1991.

ity question to the FCC in any case alleging that charges for political advertising are excessive; and (3) whether its exclusive jurisdiction should extend beyond the basic liability question and, if so, whether the Commission should preempt any cause of action in any court in which an alleged violation of Section 315(b) is an essential element.

4. Comments were received on October 21, 1991.[4] The 27 sets of comments filed on behalf or by broadcasting interests argued that the Commission has exclusive jurisdiction over all aspects of complaints alleging excessive political advertising charges and urged the Commission to preempt completely any such cause of action in any court.[5] The joint candidate commenters stated that the FCC does not have exclusive jurisdiction over Section 315(b) matters and that it lacks the authority to confer upon itself exclusive jurisdiction over any matter.[6] Finally, one commenter did not address the merits of the legal questions posed in the *Public Notice,* but requested instead that the Commission not issue any declaratory ruling to assert exclusive or primary jurisdiction until it provides "express authority for a candidate and a candidate's representatives to have access to a station's commercial files upon reasonable request."[7]

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[4] A list of the Comments received is attached as Appendix 1.

[5] *See, e.g.,* Comments of National Association of Broadcasters; Association of Independent Television Stations; Busse Broadcasting Corporation; A.H. Belo Corporation, *et al.*; Capital Cities/ABC Inc., *et al.*; Tribune Broadcasting Company, Inc.

[6] *See* Comments jointly filed by the law firms of Barnes, Browning, Tanksley & Casurella; Long, Aldridge & Normal; Savell & Williams; and Venema, Towery, Thompson & Chambliss (hereinafter "Kahn and Jablonski"), on behalf of various candidates seeking refunds for alleged overcharges.

[7] *See* Comments filed by Niels Holch, on behalf of certain candidates.

5. On the basis of our review of the comments and our own independent legal analysis, as set forth below, the Commission has concluded that any state cause of action dependent on any determination of the lowest unit charge under Section 315(b) or of some other duty arising under that subsection should be preempted.[8] Other claims, such as standard breach of contract actions, not dependent upon the determination of the lowest unit charge or some other duty arising under Section 315(b) are not preempted.[9]

DISCUSSION

6. The preemption doctrine has its roots in the Supremacy Clause of the Constitution, U.S. Const., Art. VI, cl. 2. Preemption may be either express or implied, and it is "compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose."[10] In the absence of express preemptive language, an intention by Congress to supersede state law may be inferred because of the pervasive-

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[8] Similarly, any state cause of action dependent on any determination of the lowest unit charge under Section 315(b) or of some other duty arising under that subseciton that is initiated in a federal court pursuant to diversity jurisdiction also is preempted and should be dismissed. Moreover, because Section 315(b) does not give rise to a private federal cause of action, any federal lawsuit based directly upon allegations of violations of Section 315(b) should be dismissed. *See Zell Miller for Governor v. Pacific & So. Co.*, No. 1:91-CV-RLV (N.D. Ga., June 4, 1991), slip opinion at 15 (*citing Belluso v. Turner Communications Corp.*, 633 F.2d 393, 397 (5th Cir. 1980)), *appeal pending. See also William L. Dickinson v. Cosmos Broadcasting Co.*, C.A. No. 91-T-072-N (M.D. Ala., April 1, 1991), slip opinion at 18.

[9] As the court made clear in *Zell Miller for Governor, supra*, claims that stem from Section 315(b) cannot be converted to state law claims simply because "the plaintiff may have artfully cast his essentially federal law claims as state law claims." Slip Opinion at 11-12.

[10] *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

ness of the federal regulatory scheme, because the federal interest is so dominant, or because the purpose of the federal law and the character of its obligations reveal an intent to preempt.[11] Furthermore, a court will find preemption where state law would actually conflict with federal law or would stand as an obstacle to the accomplishment of the full purposes and objectives of Congress.[12]

7. We find that Congress by implication preempted state causes of action of which alleged violations of Section 315(b) are an integral part because: (1) the purpose of the federal law and the character of its obligations reveal an intention to preempt such causes of action; (2) allowing actions to proceed in state courts would result in potentially inconsistent interpretations of federal law; and (3) such actions would stand as an obstacle to the realization of the full objectives of Congress. The express language of Section I of the Communications Act provides that, for purposes of "centralizing authority" with respect to interstate communications, Congress created the FCC "which shall execute and enforce the provisions of [the] Act." Moreover, the Supreme Court has held that, in adopting the Act, Congress "formulated a unified and comprehensive regulatory system for the [broadcasting] industry" to be administered by the Commission.[13] As to Section 315 in particular, courts have held that the Commission's authority is exclusive with respect to matters addressed specifically by the Act and, thus, that it preempts state and local regulations of those matters.[14]

8. Section 315 itself embodies Congress' mandate that uniform federal policies govern political broadcasting

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[11] *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

[12] *See Hines v. Davidowitz*, 312 U.S. 52, 57 (1941).

[13] *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940). *See also Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 6 (1942).

[14] *E.g., Belluso v. Turner Communications Corp.*, 633 F.2d 393, 396 (5th Cir. 1980).

rates. In particular, Section 315(d) specifically directs the FCC to "make rules and regulations to carry this provision [Section 315] into effect." This narrowly focused directive, which exists in addition to the more general grant of Rule Making authority in Sections 4(i) and 303(f) of the Act. 47 U.S.C. §§ 154(i) and 303(r), is "something more" than the usual delegation of Rule Making authority.[15] Rather, it "amounts to a congressional direction to the FCC to recognize the importance of this particular section of the statute and to prescribe separate rules and regulations to deal with the multitudinous situations that arise in applying it *to all federal, state and local candidates for office throughout the nation.*" [16] In view of this comprehensive regulatory and enforcement scheme, we find that Congress' purposes and objectives in adopting Section 315(b) reveal an intention to preempt state litigation over the charges for the broadcast of political advertisements.[17]

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[15] *Kay v. FCC*, 443 F.2d 638, 643-44 (D.C. Cir. 1970).

[16] *Id.* (emphasis supplied).

[17] In adopting the current version of Section 315(b), Congress indicated that the ability of the Commission to enforce that provision was an important consideration. Pointing out the importance of having restrictions that were "workable and enforceable," the Senate committee took comfort in assurances by the Commission's chairman that the broadcast provisions "were enforceable by the Commission." S. Rept. No. 96, 92d Cong., 1st Sess. 20, *reprinted*, 1972 U.S. Code Cong. & Admin. News at 1786 (1971). We note in addition the decision in *Belluso v. Turner Communications Corp.*, 633 F.2d 393, where the court held that Congress did not intend to create a private federal cause of action for damages as a remedy for a violation of Section 315(a) of the Communications Act and opted instead for an exclusive administrative remedy. The court's reasoning is equally applicable to Section 315(b). Thus, because we conclude that Congress did not intend for a private *federal* cause of action for damages to be available as an additional remedy when Section 315(b) is violated, it would seem anomalous if Congress did not also preempt the states from providing an additional remedy in the form of a private *state*

9. We further find that, regardless of whether *Congress*—either explicitly or by implication—has preempted state law claims based upon violations of Section 315(b), the Commission itself has authority to preempt such claims. Substantial judicial precedent makes clear that an agency may preempt state action under the Supremacy Clause whether or not an intention to preempt can be found in the governing statute or its legislative history. The leading case on agency preemption is *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982). The Supreme Court in that case held that "[f]ederal regulations have no less preemptive effect than federal statutes." 458 U.S. at 153. The Court held further that if the agency has not exceeded its statutory authority or acted arbitrarily, its preemption order should be upheld. 458 U.S. at 154.

10. The Supreme Court applied the rule established in *de la Cuesta* to affirm this Commission's preemption of some aspects of state regulation of cable television in *City of New York v. FCC*.[18] In proper circumstances, the Court said, the agency itself may determine "that its authority is exclusive and preempts any state efforts to regulate in the forbidden area."[19] The Court also stated that a federal agency acting within its delegated authority is empowered to preempt state laws "to the extent it is believed that such action is necessary to achieve its purposes."[20] In reviewing agency preemption orders, moreover, the Court said that it would not disturb an agency's decision to preempt if that decision represents "a reasonable accommodation of conflicting policies that were com-

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cause of action that is predicated on establishing a violation of Section 315(b). *See* also discussion in paragraph 20 *infra*.

[18] 486 U.S. 57 (1988).

[19] *Id.*, 486 U.S. at 64, *citing Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700 (1984), and *de la Cuesta*, 458 U.S. at 152-54.

[20] 486 U.S. at 63.

mitted to the agency's care," unless it appears "from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." [21]

11. Commission preemption of state claims arising under Section 315(b) meets the standards established in *City of New York*. First, as the Court stated in that case, a federal agency acting within the scope of its delegated authority may preempt state regulation.[22] Here, the Commission clearly has authority to enforce the lowest unit charge requirement as it applies to all broadcasters and all candidates;[23] indeed, it has explicit authority to prescribe appropriate rules and regulations "to carry this provision into effect." [24] The Commission's efforts over the years to provide guidance as well as to take enforcement actions with respect to Section 315(b) are evidence both of its authority under the statute and of its commitment to uniform enforcement of its regulation in this important policy area. Thus, the Commission is acting well within its delegated authority when it enforces Section 315(b).

12. Moreover, preemption is necessary to allow the Commission to "achieve its purposes" by developing uniform standards for interpreting and enforcing Section 315(b). The importance of having uniform standards that are understood throughout the broadcast industry is

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[21] 486 U.S. at 64. *See also, e.g., Computer & Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983); *North Carolina Utilities Comm'n v. FCC*, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977).

[22] 486 U.S. at 63, citing *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 368-369 (1986). The decision in *Louisiana* that the FCC had exceeded its authority to prempt relied upon an express reservation in the Communications Act of authority for the state to regulate intrastate common carrier service, 47 U.S.C. § 152(b)(1). No such provision applies to the regulation of broadcasters.

[23] *See FCC v. Pottsville Broadcasting Co.*, 309 U.S. at 137.

[24] 47 U.S.C. § 315(d). *See also Kay v. FCC*, 443 F.2d at 643-44.

underscored by the Commission's pending Rule Making into political broadcasting, which seeks, *inter alia*, to provide certainty and consistency in this important area of regulation.[25] Rulings by courts in numerous jurisdictions around the country almost certainly would produce varying and possibly conflicting determinations among state courts and between those courts and the Commission, thereby frustrating the objective of certainty and uniformity.[26]

13. As various commenters have pointed out, inconsistency in the enforcement of Section 315(b) would leave both candidates and broadcasters unsure of their respective rights and responsibilities under the lowest unit charge requirement.[27] The prospect of lawsuits in various states might make it difficult, if not perilous, for broadcasters who serve more than one jurisdiction to provide various candidates prompt, authoritative quotes for the lowest unit charge available to them. We thus find that state court adjudication of claims of which alleged violations of Section 315(b) are an integral part would "conflict with the basic objectives of federal policy"[28] with

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[25] *See Codification of the Commission's Political Programming Policies*, 6 FCC Rcd at 5710 (a purpose of the Rule Making is to develop a "single, up-to-date written source to which the public can turn for guidance" on how to comply with Section 315(b)).

[26] *Cf. Belluso v. Turner Communications Corp.*, 633 F.2d at 396 (administrative remedies before FCC for violations of Section 315(a) are exclusive); KVUE, Inc. v. Austin Broadcasting Corp., 709 F.2d 922, 934-36 (5th Cir. 1983) (state law extending "lowest unit charge" availability beyond statutory period under Section 315(b) preempted as an obstacle to achievement of purpose of federal statute).

[27] A multiplicity of tribunals and a diversity of procedures "are quite as apt to produce incompatible or conflicting adjudication as are different rules of substantive law." *Gardner v. Teamsters Union*, 346 U.S. 485, 490-91 (1953).

[28] *City of New York v. FCC*, *supra*, 486 U.S. at 69.

respect to political broadcasting. The development and enforcement of consistent guidelines by this agency, in contrast, would provide critical certainty: to candidates, the certainty that they are indeed receiving the lowest unit charge; and to broadcasters, the certainty that they are fully complying with the law.

14. Preemption also is necessary for another important reason. While there is no express statutory right of candidate access to broadcast facilities beyond the "reasonable" access provisions of Section 312(a)(7) of the Act for federal candidates, there is a public good in the dissemination of information regarding political campaigns. Indeed, the legislative history of the political broadcasting laws suggests that one purpose of those laws was "to give candidates for public office greater access to the media" and "to halt the spiraling cost of campaigning for public office."[29] We believe that the comments of some broadcasters are correct in pointing out that inconsistent rulings on Section 315(b) lawsuits might encourage some stations simply to refuse to accept political advertisements, or at least, in the case of federal candidates, to curtail such advertisements to a bare minimum. Such a response to state lawsuits, we believe, would frustrate the Congressional intention to encourage greater, (and less costly) access for candidates.[30] We conclude, therefore, that we should preempt state lawsuits of which allegations of vio-

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[29] *See* S. Rept. No. 96, 92d Cong., 1st Sess., at 20, *reprinted*, 1972 U.S. Code Cong. & Admin. News at 1774.

[30] *Cf. Farmers Educational & Coop. Union v. WDAY, Inc.*, 360 U.S. 525, 534-35 (1959); *KVUE v. Austin Broadcasting*, 709 F.2d at 936 n.65. We recognize that, apart form the equal opportunities provision of Section 315(a), Congress chose not to require that stations afford access rights to individual state and local candidates. Nevertheless, Congress clearly wanted to foster and encourage candidates' access to the broadcast media, and the state lawsuits conflict with that objective

lations of Section 315(b) are an integral part to avoid frustration of this federal purpose.[81]

15. As the Court observed in *City of New York*, "it has long been recognized that many of the responsibilities conferred upon federal agencies involve a broad grant of authority to reconcile conflicting policies."[83] In this case, the Commission's determination that preemption is necessary to avoid disruption or frustration of its enforcement of Section 315(b) is a "reasonable accommodation of conflicting policies."[83] The emergence of civil litigation in a number of courts around the country raises a real possibility of conflicting rulings as to what constitutes the "lowest unit charge" and what remedies are appropriate for violations of the statutory requirement. The FCC is the authority specifically designated by Congress to enforce the lowest unit charge requirement,[84] however, precisely because it has the expertise necessary to make such determinations based upon its understanding of the complex and often arcane practices of the broadcast advertising industry. Preempting claims arising under Section 315(b) represents a reasonable approach to avoiding conflicting policies in the interpretation and enforcement of the lowest unit charge requirement.

16. There also is no basis for believing that preemption is "an accommodation of policies that Congress would not have sanctioned."[85] The Supreme Court in other contexts has found that Congress intended in adopting the Communications Act to give the FCC broad authority to provide "a unified and comprehensive regulatory system

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[81] *See City of New York v. FCC*, 486 U.S. at 64.

[82] 486 U.S. at 64.

[83] *Id.*

[84] *See* 47 U.S.C. §315(d).

[85] *See City of New York v. FCC*, 486 U.S. at 64.

for the [broadcasting] industry." [36] Although in adopting Section 315(b) Congress did not expressly preempt state regulation, neither did it indicate any intention that the Commission refrain from preempting if the Commission believes such action is necessary or appropriate to its enforcement of that section.[37]

17. We recognize that, in our previous consideration of this matter,[38] we limited our conclusion in favor of preemption to the issue of liability and did not find it necessary to decide whether preemption should also extend to efforts to obtain state law remedies for the violation of federal requirements relating to lowest unit charge. After considering the comments submitted in response to the *Public Notice*, however, we have had an opportunity to thoroughly analyze the reasons that support preemption in this area. It is now clear to us that those considerations support preempting state law remedies for the violations of the lowest unit charge requirement or of some other federal duty arising under Section 315(b).

18. The Commission has been specifically designated by Congress as the authority responsible for enforcing Section 315(b), and a determination of the appropriate remedy for a violation of Section 315(b) is an integral part of that enforcement. State efforts to provide their own remedies for a violation of the lowest unit charge requirement of Section 315(b), or of other duties arising thereunder, would interfere with uniform enforcement of the Act by

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[36] *U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 168 (1968), *quoting FCC v. Pottsville Broadcasting Co.*, 309 U.S. at 137. *See also Farmers Educational & Coop. Union v. WDAY, Inc.*, 360 U.S. at 529 (state libel actions preempted to avoid undermining a "basic purpose" of Section 315, even though an express provision preempting such actions had been deleted from final version of statute).

[37] *City of New York v. FCC*, 486 U.S. at 69.

[38] *See* News Release, Report No. GN-74, June 6, 1991 (cited in n.3, *supra*).

the Commission just as surely as would state determinations of the initial question of whether Section 315(b) has been violated.

19. The Supreme Court recognized a related policy concern when it upheld the preemption of judicial remedies for defamation arising from political broadcasts in *Farmers Educational & Coop. Union v. WDAY, Inc.*[39] In that case, the Court found that allowing a separate judicial remedy would "hamper the Congressional plan to develop broadcasting as a political outlet."[40] Therefore, the Court affirmed the preemption of local lawsuits that stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[41] We believe that allowing state courts to impose additional remedies for violations of Section 315(b) might encourage stations to refuse to carry political advertising, and thereby would frustrate the Congressional intent to foster dissemination of information regarding political campaigns.[42] Thus, we conclude that our preemption should extend to remedies as well as to the determinations of liability.

20. Finally, we note that Section 414 of the Act, which preserves remedies "existing at common law or by statute," does not foreclose our preemptive actions here. Such "savings clauses" do not preclude preemption where allowing state remedies would lead to a conflict with or frustration of statutory purposes.[43] In any event, the law-

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[39] 360 U.S. at 534-35.

[40] 360 U.S. at 535.

[41] *Id.* (citation omitted).

[42] *See KVUE v. Austin Broadcasting*, 709 F.2d at 936 n. 65.

[43] *See, e.g.*, Texas & Pacific Railroad Co. v. Abilene Cotton Oil Co., 204 U.S. 427 (1907); *Pennsylvania Railroad v. Puritan Coal Mining Co.*, 237 U.S. 121, 129 (1915); *In re Long Distance Telecommunications Litigation*, 831 F.2d 627 (6th Cir. 1987); *Comtronics, Inc. v. Puerto Rico Telephone Co.*, 553 F.2d 701,

suits we preempt here have no meaning apart from Section 315(b) and thus derive not from any "existing" state common law or statutory origin, but solely from the federal statute.[44] State actions to enforce the Section 315(b) obligations of broadcasters are far removed from the traditional state remedies that are preserved by the "savings clause." *See, e.g., Arrow Transp. Co. v. Southern R. Co.*, 372 U.S. 658, 671 n.22 (1963). Section 414 cannot have been intended to "create" new state causes of action based on legal obligations established under federal law and enforced by this Commission.[45]

PROCEDURES

21. The Commission finds that it will further our ability to promptly and fairly dispose of Section 315(b) complaints brought to us as a consequence of this ruling (and all other Section 315(b) claims) by setting out the procedural framework for resolution of such complaints.

22. In order to invoke the Commission's enforcement procedures, complainants alleging a violation of Section 315(b) will be required to make a *prima facie* case.[46]

707-08 n.6 (1st Cir. 1977); *Blackburn v. Doubleday Broadcasting, Inc., 353 N.W.2d 550 (Minn. 1984).*

[44] *Zell Miller for Governor, supra*, slip op. at 11-12.

[45] *See Comtronics, Inc. v. Puerto Rico Tel. Co.*, 553 F.2d at 708 n.6.

We also reject the argument that we should not preempt because only the courts can finally determine the extent of our authority. Our preemption order clearly is subject to judicial review pursuant to Section 402(a) of the Communications Act, 47 U.S.C. §402(a). *See also* 28 U.S.C. § 2342 *et seq.* But that fact neither disables us from making a declaratory ruling as to our view of our authority nor excuses us of our obligation to clarify an issue in dispute.

[46] As a matter of general policy, we also believe that complainants should bring any lowest unit charge complaints in a timely manner. It would not serve the public interest to attempt to resolve such complaints on the basis of a stale record, and by requiring timely action we ensure that the Commission is able "to remedy violations before a pattern of abuse develops." *Na-*

This must, at minimum, consist of a short, plain statement of the claim sufficient to show that the complainant is entitled to the relief requested. This requirement could be met by a simple recitation of a sequence of events showing that, if all allegations are accepted as true and all inferences are drawn in the complainant's favor, the complaint would reasonably lie.[47] The complainant will be required to serve the complaint upon the station, and the station will be given ten days to answer the complaint if it so desires. If, after reviewing the complaint and answer (if filed), the Mass Media Bureau ("Bureau") finds that a *prima facie* case has been made, it will issue an Order that will give the parties the opportunity to elect one of two alternative procedures to resolve the complaint: mediation (Alternative Dispute Resolution);[48] or evaluation

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tional Citizens Committee for Broadcasting v. FCC, 567 F.2d 1095, 1116 (D.C. Cir. 1977); *cert. denied*, 436 U.S. 926 (1978).

[47] We intend to apply a standard similar to that imposed by Section 8(a)(2) of the Federal Rules of Civil Procedure. Thus, a complainant would be required to describe the factual basis for its belief that a specific station has committed a violation, rather than, for example, merely accusing a station of overcharging candidates based upon general information released in the Mass Media Bureau's 1990 Audit Report. Similarly, the fact that a station made efforts to settle overcharge claims would not be considered in deciding whether a complainant has established a *prima facie* case.

In the past, candidates have relied upon invoices or other information demonstrating inconsistencies in lowest unit charges. In addition, a complainant could make a *prima facie* case by using generally-available industry or statistical data on average rates to support its belief that the rate paid by a candidate was higher than the average rate charged by the station for the same class of time. These examples, of course, are not the sole means by which a *prima facie* case could be established; rather, they are merely intended to serve as a useful guide to interested parties.

[48] In this regard, the Commission believes that time-limited mediation may be the most efficient means of resolving complaints, particularly where the circumstances of a given case are fairly straightforward. Therefore, the Commission's proposed

and disposition by the Bureau subject, of course, to review by the full Commission.

23. Under either process, once a *prima facie* showing has been made, the complainant will be entitled to limited discovery subject to specific conditions. The Bureau's Order will establish the limitations on and timetable for discovery.[49] Documents subject to discovery will consist of the station's records related to rates, terms and conditions for any advertising, commercial or political, broadcast during the 45- or 60-day period pertinent to the complaint. The station will be permitted to redact its records prior to production by deleting the identities of commercial advertisers and other proprietary information not relevant to the resolution of the complaint. Document production will be subject to a protective order limiting its examination to parties designated in the order (as well as the Commission), and prohibiting further dissemination of the information revealed thereby.[50]

24. Within 30 days after the completion of discovery, the complainant will be required to file an amended complaint alleging specific facts based on the information discovered, stating the nature of the Secton 315(b) violation and the amounts said to to be owed. The station complained against will be given a 15 day opportunity to respond. If the parties have not elected to pursue mediation,[51] the Bureau will either impose an appropriate sanc-

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Alternative Dispute Resolution process. (ADR) may provide a useful vehicle to resolve these complaints in a fair and expeditious manner. *See Initial Policy Statement and Order*, FCC Release No. 91-304, 56 Fed. Reg. 51178 (October 10, 1991).

[49] No more than sixty days will be allowed for discovery.

[50] Failure to abide by the terms of the protective order may result in the imposition of sanctions which could include those set forth in 47 C.F.R. § 1.24 (censure, suspension or disbarment of persons practicing before the Commission) or possible dismissal of the complaint.

[51] Even if the parties elect to resolve a dispute through mediation, we of course retain our jurisdiction to enforce the requirements of Section 315(b).

tion where it finds the rules have been violated, or issue an appropriate order dismissing the complaint where it finds no violation.[52] In appropriate circumstances, the dispute may be referred to the Administrative Law Judges (ALJs) for resolution.

25. The sanctions available to the Commission for Section 315(b) violations (in addition to the rebate of any amounts found to have been charged in violation of Section 315(b)) include forfeitures, letters of admonition, short-term renewal, and designation of the station's license for revocation. Any decision rendered by the Bureau or an ALJ may be appealed directly to the full Commission.[53]

26. Accordingly, pursuant to Sections 1, 4(i), 303(r), and 315(b) and (d) of the Communications Act, 47 U.S.C. §§ 151, 154(i), 303(r), and 315(b) and (d); Section 5(e) of the Administrative Procedure Act, 5 U.S.C. § 556(e); and Section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, *IT IS DECLARED* that state causes of action involving alleged violations of the lowest unit charge requirement or of some other duty arising under Section 315(b) ARE PREEMPTED to the extent indicated above.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[52] Given the substantial demand on agency resources which Section 315(b) cases might create, the Commission would welcome bona fide, mutually satisfactory settlements of overcharge disputes between complainants candidates and respondent broadcasters. Thus, while retaining our discretion to determine whether additional sanctions are warranted, the Commission would be inclined to look with favor upon such settlements in making that determination.

[53] *See* 47 C.F.R. § 1.115.

Separate Statement of Commissioner
James H. Quello, Dissenting in part.

In re: Exclusive Jurisdiction With Respect to Potential Violations of the Lowest Unit Charge Requirements of Section 315(b) of the Communications Act of 1934, as amended.

By this Declaratory Ruling ("Ruling"), the Commission is taking the important step of reaffirming our exclusive jurisdiction to enforce violations of Section 315 of the Communications Act. To the extent it does so, the Ruling is fully supported by law and represents sound policy. I can support this aspect of the Ruling without reservation.

I think it is important to emphasize that this action does not represent a new assertion of FCC authority. Section 315 never has been considered to have created a private right of action separate from our administrative processes. *See, e.g., Belluso v. Turner Communications Corp.*, 633 F.2d 393, 397 (5th Cir. 1980). Until recently, no one had ever sought a judicial remedy for purported lowest unit charge violations. In the two decades since Section 315(b) was enacted, the Commission has provided the sole remedy.

So in many ways this Ruling merely recognizes the obvious. It certainly is no departure from the Commission's historic view of its jurisdiction and statutory responsibilities. This necessarily means that the Commission is not "taking away" any existing remedy.

Conspicuously absent from the Ruling is any discussion of the Commission's existing complaint procedures or any suggestion that they have been in some way inadequate. Perhaps the reason for this omission is the fact that the Commission did not request comment on the question of procedures, nor did it engage in much internal analysis on this point.[1]

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[1] To put the issue into some perspective, the Commission adopted the Notice of Proposed Rulemaking on our political broadcasting

It has been suggested that the FCC is not obligated to provide parties an opportunity to comment on procedural issues. Whether or not this claim is true in this context, the Commission has been rather erratic in this proceeding in deciding when to solicit and when to forego public input. For example, there is no requirement that the Commission receive comments in order to promulgate a declaratory ruling, yet we chose to do so here. Also, in our *Notice of Proposed Rulemaking*, the Commission solicited advice on procedures for implementing sponsorship ID and other requirements. In all of our current proceedings, the question of complaint procedures is the only significant subject on which we did not request comment. If, as some have suggested, our current proceedings "may be the most important determinations made since the enactment of the lowest unit charge standard," this omission is exceedingly strange.

At this point, the new procedural guidelines raise more questions than they answer. For example, the Ruling encourages the use of Alternative Dispute Resolution at a time when the Commission's policy on such procedures is essentially conceptual. There is no discussion of how discovery will be limited to relevant documents or how the Commission will enforce such limits. Moreover, although the Ruling expresses concern with the potential administrative burden created by complaints, it establishes a new multi-stage procedure that includes a complaint, discovery, an amended complaint and several levels of Commission decisions including the possibility of hearings.

I dissent from the hastily made decision to adopt procedures because we do not yet know whether the new guidelines will help or make matters worse. Will the new procedures allow candidates to make a prima facie case and obtain quick relief or will they delay matters? Will

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policies last June. The Commission began examining the issue of jurisdiction in July and released the Notice of Intent to Issue a Declaratory Ruling in October. By sharp contrast, a draft order proposing new procedures was circulated less than a week ago at a time when other pressing matters were under consideration.

they encourage the filing of sepculative complaints, thus requiring the extension of our abuse of process rules? Will the number of complaints diminish now that the Commission is clarifying the political rules or will the volume of complaints under the new procedures create an administrative nightmare? We simply do not know. And, unfortunately, there was insufficient interest at the Commission in taking the time to find out.

I would have preferred to adopt the Declaratory Ruling on preemption and at the same time, issue a Further Notice to explore these issues. I believe that candidates, broadcasters and other interested parties would have welcomed the opportunity to comment on the issue of procedures.

Ironically, the internal pressure to adopt procedures intensified at the very time that the Commission is clearing up the confusion that prompted this Declaratory Ruling. Along with this Ruling and the *Report and Order*, the Commission is releasing a number of enforcement actions arising from the 1990 political broadcasting audit. Contrary to the exaggerated claims that 80 percent of television and 50 percent of radio stations overcharged candidates, the Bureau is assessing fines for overcharging in only two cases—about 7 percent of the stations audited. All together, the Bureau is issuing Notices of Apparent Liability to five of the thirty stations we examined, two for lowest unit charge violations and three for political file violations. In short, the level of rule violations by broadcasters is far below what some suggested in the wake of the audit. For this reason I wonder whether the rush to adopt new procedures may be premature.

We are doing the right thing by making clear that the Commission has exclusive jurisdiction to determine both liability and damages in complaints that implicate Section 315(b). Although I would not have taken the additional step of adopting procedures just yet, I am hopeful that they can be administered efficiently, and in a way that is fair to all concerned.

SEPARATE STATEMENT OF COMMISSIONER SHERRIE P. MARSHALL

Re: Declaratory Ruling on FCC Preemption of Claims Dependent on Section 315(b)

Today's declaratory ruling should not be interpreted as the generous act of a Federal agency intent on providing shelter to broadcasters charged with price gouging. To the contrary, I write separately to emphasize that the Commission is asserting its jurisdiction over all claims sounding in 47 USC § 315(b) so as to vigorously prosecute such claims, not bury them.

I joined in calling for this full extension of the Commission's preemptive authority only after I was confident that the Commission possessed the legal authority, the administrative wherewithal, and the institutional resolve to adjudicate Section 315 claims fairly and competently. Our declaratory ruling itself recounts in detail the weighty record compiled in support of Commission preemption of all claims arising from the statutory duty of broadcasters to provide candidates with the lowest unit charge for political advertisements.

That ruling also details the efficient, yet fair administrative processes the Commission has established for prompt resolution of bona fide overcharge grievances. Moreover, the fines and rebates we are separately ordering today for past violations of § 315(b) clearly demonstrate this Commission's commitment to enforcing the legal obligations our licensees owe candidates for public office.

While we stand prepared to provide for a timely and thorough resolution of all candidate overcharge claims, I would not deny that the recent surge of such allegations could create a substantial burden on the Commission's ever scarce resources. Thus, I strongly endorse the Commission's offer of an alternative dispute resolution process to both candidates and respondent broadcast stations.

I also wish to underscore the sincerity of the Commission's suggestion that stations and candidates should attempt to reach a mutually satisfactory settlement of their overcharge disputes. As our declaratory ruling explains, the Commission will look favorably upon the private settlement of these disputes in reviewing any overcharge claims brought to its attention. Indeed, in light of the flood of claims that might immediately follow our issuance of this preemption ruling, this Commissioner, for one, will be disinclined to impose any additional sanctions on licensees who act promptly to rebate funds or otherwise redress the bona fide claims of aggrieved candidates pursuant to such a settlement.

Let us move with dispatch to dispose of these past grievances and ensure—through our newly revised political broadcast rules—clear regulatory guidance to broadcasters and candidates alike for the upcoming and future political campaign seasons.

APPENDIX D

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

PUBLIC NOTICE

Released: October 10, 1991

NOTICE OF INTENTION TO ISSUE DECLARATORY RULING WITH RESPECT TO EXCLUSIVE AUTHORITY OF FCC TO DETERMINE WHETHER BROADCASTERS HAVE VIOLATED LOWEST UNIT CHARGE REQUIREMENT OF SECTION 315(b)

COMMENT PERIOD ESTABLISHED

Comments due: October 21, 1991

The Commission is considering issuing on its own motion a declaratory ruling confirming its earlier conclusion that it has exclusive jurisdiction to determine questions of liability for violations of Section 315(b) of the Communications Act. News Release, Report No. GN-74, June 6, 1991. The Commission also is considering whether its exclusive jurisdiction should extend beyond the basic liability question and, if so, whether it should preempt any cause of action in which an alleged violation of Section 315(b) is an essential element. This *Public Notice* invites interested parties to comment on these issues by October 21, 1991.

Candidates for elective office in several states have sued broadcast stations, on various legal theories, for allegedly overcharging the candidates for political advertisements. The lawsuits, some of them in state courts and others in federal courts, are based ultimately on allegations that

the stations charged the candidates more than the "lowest unit charge" or the charge for "comparable use" of the station—standards that are set forth in Section 315(b) of the Communications Act and enforced by the Federal Communications Commission.

In one of these cases, the United States District Court for the Northern District of Georgia held that the Commission has exclusive jurisdiction to determine whether a station has violated Section 315(b).[1] The court held further that the Commission's procedures are the exclusive remedy for violations of Section 315(b). In particular, the court found that state court complaints brought by candidates against broadcasters for alleged violations of Section 315(b) present a federal question and noted that "enforcement of the [Communications Act] and vindication of the public interest are vested in the Federal Communications Commission."[2] Pointing to the "pervasive statutory and administrative scheme to enforce section 315," the court cited cases in which the Commission has ruled on candidates' complaints about overcharges and in which rebates have been ordered.[3] The court dismissed the complaints and held that the Commission provides candidates an exclusive remedy for violations of Section 315(b). That decision is now on appeal to the United States Court of Appeals for the Eleventh Circuit.[4]

In contrast, in a second case, the United States District Court for the Middle District of Alabama held that com-

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[1] *Zell Miller for Governor, et al. v. Pacific and Southern Company*, Civil Action No. 1:91-CV-267-RLV (N.D. Ga.) (Order, released June 4, 1991).

[2] *Id.*, slip op. at 13, *quoting Belluso v. Turner Communications Corp.*, 633 F.2d 393, 397 (5th Cir. 1980).

[3] Slip op. at 13-14, *citing Hernstadt v. FCC*, 677 F.2d 893 (D.C. Cir. 1980); *Atlin Communications, Inc.*, 5 FCC Rcd 2835 (M.M.B. 1990); *Southern Arkansas Radio Co.*, 5 FCC Rcd 4643 (M.M.B. 1990).

[4] No. 91-8561 (11th Cir., filed June 27, 1991).

plaints filed in state court by political candidates against broadcasters for alleged advertising overcharges did not present a federal question warranting removal of the case by the defendants to federal district court.[5] That court held that the complaints were "essentially local to the state," even though resolution of the claims probably would require some application of federal statutes and regulations.[6] It accordingly remanded the case to the Alabama state court for further proceedings.

In the wake of that remand, the Commission appeared before the Alabama state court as *amicus curiae* and argued that the issue of whether a broadcaster had violated Section 315(b) was within the exclusive primary jurisdiction of the FCC and should be referred to the agency for determination. The Commission stated that consistency in the application and enforcement of Section 315(b) requires that the Commission in every instance make the basic liability determination in cases alleging overcharges for political advertisements. The Commission thus concluded that, in order to fulfill its own responsibilities under the Act, it must assert its exclusive primary jurisdiction to determine the question of liability.[7] *Compare Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700 (1984); *City of New York v. FCC*, 486 U.S. 57, 63-64 (1988), *citing Fidelity Federal Savings and Loan Assn. v. De la Cuesta*, 458 U.S. 141, 154 (1982). Nonetheless, although the Alabama state court recognized the Commission's "strong interest" in enforcing Section 315(b), it has not referred the liability determination to

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[5] *William Dickinson v. Cosmos Broadcasting Co.*, Civil Action No. 91-T-072-N (M.D. Ala.) (Order, released April 1, 1991).

[6] *Id.*, slip op. at 17.

[7] This exclusive jurisdiction over Section 315(b) liability determinations, moreover, must be recognized by both federal and state courts.

the Commission and has not stayed its own proceedings to permit the agency to make such a determination.[8]

In view of the inconsistencies among these federal and state court decisions and the likely proliferation of similar suits in a number of jurisdictions, the Commission is now considering issuing a declaratory ruling to clarify its role in resolving these political broadcasting controversies. It accordingly requests comment on whether its jurisdiction to determine the lawfulness of political advertising charges is exclusive and whether federal and state courts must refer the liability question to the FCC in any case alleging that charges for political advertising are excessive. The Commission also seeks comments on whether its exclusive jurisdiction should extend beyond the basic liability question and, if so, whether the Commission should preempt any cause of action in any court in which an alleged violation of Section 315(b) is an essential element.[9]

Interested parties may file comments in this matter no later than October 21, 1991. Reply comments will not be accepted, and no extensions of this comment period are contemplated.

An original and four copies of all comments must be filed in accordance with Section 1.51(c) of the Commission's Rules. In addition, copies of each pleading must

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[8] *See William L. Dickinson v. Cosmos Broadcasting Co.*, Circuit Court for Montgomery, Alabama, Case No. CV-91-67-P (Order, released September 23, 1991). It was "significant" to the state court that the Commission "has not taken a position here that the claims of the Plaintiffs are preempted by the Communications Act." Slip op. at 3. That order denied motions to dismiss, filed by the defendants, arguing that state court actions for overcharges for political advertising were preempted. The defendants have asked the Alabama Supreme Court to review the denial of their motions to dismiss.

[9] In this regard the Commission believes it would be advisable for courts to stay any ongoing proceedings pending the issuance of any declaratory ruling as a result of this notice.

be filed as follows: one copy with the Downtown Copy Center (DCC), the Commission's duplicating contractor, at its office in Room 246, 1919 M Street, N.W., Washington, D.C. 20554; one copy with the Office of General Counsel, Room 614, 1919 M Street, N.W., Washington, D.C. 20554; and one copy with the Mass Media Bureau, Room 314, 1919 M Street, N.W., Washington, D.C. 20554.

Copies of comments may be obtained from DCC. The documents will be available for public inspection and copying in Room 614, 1919 M Street, N.W.

For further information, contact Diane L. Hofbauer, Office of General Counsel, at (202) 632-7020.

FEDERAL COMMUNICATIONS COMMISSION

SEPARATE STATEMENT OF CHAIRMAN ALFRED C. SIKES AND COMMISSIONER ANDREW C. BARRETT

ON NOTICE OF INTENTION TO ISSUE DECLARATORY RULING WITH RESPECT TO EXCLUSIVE AUTHORITY OF FCC TO DETERMINE VIOLATIONS OF SECTION 315(b) OF COMMUNICATIONS ACT

We have no objection to asking whether or not the Commission's exclusive jurisdiction can or should be "extend[ed] beyond the basic liability question" of whether there has been a violation of Section 315(b). However, we write to emphasize that asking this question should not be read as concluding that the Commission has the ability—or should exercise that ability—to totally preempt state or federal judicial proceedings with respect to both liability and damages in this area.

SUPREME COURT, U.S.
FILED
FEB 26 1996
CLERK

Nos. 95-1197 and 95-1200

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS (No. 95-1200), *and* National Association of Broadcasters, et al., Petitioners (No. 95-1197),

Petitioners,

v.

ZELL MILLER, et al.,

Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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February 26, 1996

24pp

QUESTIONS PRESENTED

Section 315(b) of the Communications Act of 1934 provides that during certain periods the charges made for use of any broadcasting station by any legally qualified candidate for public office shall not exceed the lowest unit charge of the station for the same class and amount of time for the same period. The Federal Communications Commission ("FCC") issued a declaratory ruling purporting to preempt all state causes of action dependent on any determination of the lowest unit charge under Section 315(b), or of any other duty arising under that subsection, and purporting to constitute the FCC as the sole forum for adjudicating such matters. Based upon the record and the arguments set forth in each Petition, the Respondents understand the three questions presented by the Petitioners to be: (1) whether the Respondents' petition to the United States Court of Appeals for the Eleventh Circuit, for review of the Declaratory Ruling pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342, presented a justiciable case or controversy, and (2) if Respondents presented a justiciable case or controversy, whether the FCC has authority to issue a declaratory ruling purporting to preempt any such matters and purporting to constitute itself as the exclusive forum for adjudicating any such matters, and (3) if the FCC has such authority, whether the Declaratory Ruling was valid in this case.

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The petitioners in the court of appeals were Zell Miller; Zell Miller For Governor; Pierre Howard; Georgians For Howard '90; Johnny Isakson; Johnny Isakson For Governor; Andrew Young; Young Working For Georgia; Lauren McDonald; Lauren McDonald For Governor; Roy Barnes; Roy Barnes For Governor; Tim Ryles; Tim Ryles For Insurance Commissioner; Warren Evans; Warren Evans Election Committee; William L. Dickinson, Second District Campaign Committee; William J. Cabaniss; Friends of Bill Cabaniss Committee; Spencer T. Bachus, III; Bachus For Attorney General Committee; John Teague; James E. Folsom, Jr.; Jim Folsom, Jr. For Lieutenant Governor Committee; Fob James; Fob James For Governor Committee; Kenneth D. Wallis; Alabamians For Ken Wallis Committee; George D.H. McMillan, Jr.; The McMillan Committee; George Wallace, Jr.; Wallace For Treasurer Committee; Charles A. Graddick; Graddick For Governor Committee; William J. Baxley; Friends Of Bill Baxley; Paul Hubbert; Richard Shelby; Don Siegelman; Jimmy Sullivan; Sonny Hornsby; Friends of E.C. Sonny Hornsby; Mark Kennedy; Judge Mark Kennedy For Supreme Court; and Friends Of Judge Mark Kennedy (collectively, the "*Candidates*"). The Candidates are the Respondents in this Court in Nos. 95-1197 and 95-1200, and have filed, simultaneously herewith, a *conditional* consolidated Cross-Petition For a Writ of Certiorari in Nos. 95-1197 and 95-1200.

The United States and the Federal Communications Commission were respondents in the court of appeals, and are the Petitioners in No. 95-1200.

Respondents-intervenors in the court of appeals were Capital Cities/ABC, Inc.; Chris-Craft Industries, Inc.; The Times Mirror Company; American Family Broadcast Group, Inc.; Allbritton Communications Company; CBS, Inc.; Chronicle Publishing Co.; Fox Television Stations, Inc.; Gillett Broadcasting of California, Inc.; Gillett Communications of San

Diego, Inc.; Great American Television and Radio Company, Inc.; Kelly Broadcasting Company; Kelly Television Company; Lin Television Company; McCraw-Hill Broadcasting Company, Inc.; Midwest Television, Inc.; National Broadcasting Company, Inc.; The New York Times Company; Post-Newsweek Stations, Inc.; The Providence Journal Company; The Spartan Broadcasting Company; Tribune Broadcasting Company; Westinghouse Broadcasting Company, Inc.; WKRG-TV, Inc.; WTVT, Inc.; Meredith Corporation; A.H. Belo Corporation; Cosmos Broadcasting Corporation; Cox Enterprises, Inc.; and the National Association of Broadcasters (collectively, the "*Broadcasters*"). The Broadcasters filed a separate Petition For A Writ of Certiorari, docketed in this Court as No. 95-1197.

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STATEMENT OF THE CASE

Respondents are legally qualified candidates for public office (the "Candidates") who filed a petition in the United States Court of Appeals for the Eleventh Circuit to review an order (the "Declaratory Ruling") issued by the Federal Communications Commission ("FCC"). The Petitioners in this Court are the United States of America and the FCC (the "FCC")(Case No. 95-1200), and the owners of various television broadcast stations regulated by the FCC (collectively, the "Broadcasters")(Case No. 95-1197). The Candidates adopt the Petitioners' Statements of the Case, except as follows:

(1) The judgment of the United States District Court for the Northern District of Georgia in the *Zell Miller* case described in the Petition for a Writ of Certiorari filed by the FCC, No. 95-1200 (hereinafter the "*FCC Petition*") at page 8, holding that there is no implied federal cause of action for violations of Section 315(b), has been vacated. *See Zell Miller For Governor v. Pac. & S. Co.*, No. 1:91-CV-267-RLV (N.D. Ga. June 4, 1991), *vacated*, No. 91-8561 (11th Cir. Dec. 28, 1992).

(2) In the Declaratory Ruling, the FCC ruled that "any state cause of action *dependent on any determination of the lowest unit charge* under Section 315(b) of the Communications Act of 1934, *or of some other duty arising* under that subsection, is preempted by federal law. The sole forum for adjudicating such matters shall be this Commission." *Appendix to FCC Petition* (hereinafter "*FCC App.*") at 16a (emphasis added). Various characterizations of the Declaratory Ruling by the Petitioners describe the matters which the FCC purported to preempt more narrowly than such matters were described by the FCC in the Declaratory Ruling. The Declaratory Ruling does not, as appears to be

suggested in the Petitions,[1] purport to limit its preemptive effect to state causes of action alleging *violations* of Section 315(b); the Declaratory Ruling extends to all matters dependent upon any determination of any duty imposed upon broadcasting stations by Section 315(b).

(3) As set forth below in the Reasons for Denying the Petitions, the Candidates do not agree with the legal arguments included within the Statement of the Case set forth at page 4 of the Broadcasters' Petition, to the effect that the decision of the court of appeals conflicts with prior decisions of this Court and decisions of other courts of appeals.

(4) The FCC states that it has "adjudicated numerous disputes between candidates and broadcasters over political advertising charges" and that it has "ordered rebates to candidates" for violations of Section 315(b). *FCC Petition* at 5. This statement gives the erroneous impression that the FCC has the authority to issue orders to pay refunds which are enforceable by candidates. In fact, the FCC's authority is limited to the imposition of administrative sanctions (47 U.S.C. § 312) (*e.g.* license revocation), or forfeiture penalties (47 U.S.C. § 503(b)). None of the orders referred

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[1] *See FCC Petition* at I ("whether the court of appeals should have upheld the Federal Communications Commission's (FCC) authority to provide, by declaratory ruling, that causes of action purportedly based on state law but *alleging violations of the federal "lowest unit charge" requirement* are preempted, and that *all such disputes over violation of that requirement* must be adjudicated by the FCC, subject to judicial review exclusively in the federal courts of appeals.") (emphasis added); *Petition For a Writ of Certiorari of National Association of Broadcasters, et al.,* No. 95-1197 (hereinafter *"Broadcasters' Petition)* at i ("The Federal Communications Commission issued a declaratory ruling that pre-empted all state law claims that purport to be *based upon a violation* of Section 315's lowest unit charge requirement.") (emphasis added); *id.* ("Whether challenges to an FCC order pre-empting state law causes of action *based solely on alleged violations* of the "lowest unit charge" requirement in Section 315 (b) are reviewable by a court of appeals pursuant to Section 402 (a) of the Communications Act and 28 U.S.C. § 2342, and whether that preemption order was valid.") (emphasis added).

to in the FCC's Petition was enforceable by candidates themselves. Section 401(b) of the Communications Act, moreover, specifically excludes orders for the payment of money from the category of orders which may be enforced by the courts.

REASONS FOR DENYING THE PETITIONS

The Petitioners ask this Court to review three questions: (1) whether the Candidates' petition to the court of appeals to review the Declaratory Ruling presented a justiciable case or controversy, (2) if so, whether the FCC had authority to issue the Declaratory Ruling, and (3) if so, whether the Declaratory Ruling was valid. By presenting not only the first two questions (which were addressed by the court of appeals), but also the third question (which the court of appeals did not reach), the Petitioners are asking this Court to disregard the actual holding of the court of appeals: "Because we conclude that no case or controversy is presented, we DISMISS the petition for review." *FCC App.* at 15a.

The Candidates respectfully submit that the only questions the Petitioners could present properly to this Court at this time would be whether the Candidates' petition for review presented a justiciable case or controversy, and whether the FCC had authority to issue the Declaratory Ruling, because those are the only issues actually addressed by the court of appeals. "This Court does not normally review orders of administrative agencies in the first instance . . .." *Civil Aeronautics Bd. v. American Air Transport, Inc.*, 344 U.S. 4, 5 (1952). In the event that this Court were to conclude that the Candidates presented a justiciable case or controversy, and that the FCC had authority to issue the Declaratory Ruling, the proper disposition would be to remand this proceeding to the court of appeals to review the

validity of the Declaratory Ruling. *See FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 365 (1955):

> The correction of errors of law by a Court of Appeals on review of administrative agencies is committed to this Court through its certiorari jurisdiction. We have found such errors of law in the decision of the Court of Appeals. Therefore, the decision below cannot stand. But it is not our function to reinstate the determination of the Commission. That would make this Court the reviewing body of the ultimate determination of the Commission. The proper disposition is to remand the case to the Court of Appeals for reconsideration of the record but freed from rulings declared erroneous in this opinion.

On the issue of the FCC's authority to issue the Declaratory Ruling, before dismissing the Candidates' petition, the court of appeals expressed its view that "Congress has not delegated, and could not delegate, the power to any agency to oust state courts and federal district courts of subject matter jurisdiction . . .." *FCC App.* at 10a. As a result, the court of appeals concluded that the Declaratory Ruling would not preclude any candidate from seeking judicial relief in any court, and that the courts would be free to decide the preemption issue in any case filed by any candidate. *FCC App.* at 15a. Having concluded that the courts were free to decide the preemption issue, the court of appeals declined to give an "advisory opinion" on whether Congress itself intended the preemptive effect set forth in the Declaratory Ruling. *See Flast v. Cohen*, 392 U.S. 83, 94-95 (1968).

The Candidates submit that, having concluded correctly that the FCC had no authority to issue the Declaratory Ruling, the court of appeals properly declined to render an advisory

opinion on the issue of Congressional intent.[2] Certiorari should be denied in this case because the court of appeals' conclusion that the FCC had no such authority does not conflict with any decision of this Court, or of any other United States court of appeals, or of any state court of last resort; does not present a question which is not already settled by this Court; does not depart from the accepted and usual course of judicial proceedings; and does not call for an exercise of this Court's supervisory power. To the contrary, the court of appeals' decision merely reflects fundamental principles of constitutional law.

There is a "deeply rooted presumption in favor of concurrent state court jurisdiction." *Tafflin v. Levitt*, 493 U.S. 455, 459 (1990). "Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). The "purpose of Congress to supersede or exclude state action . . . is not lightly to be inferred. The intention to do so must definitely and clearly appear." *Mintz v. Baldwin*, 289 U.S. 346, 350 (1933).

In *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986), this Court held that an administrative agency:

> literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it. . . . [The] best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency.

The nature of the authority granted by Congress to the FCC is limited in scope to matters involving regulation of interstate and foreign communications by wire and radio. The FCC has no

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[2] Because the court of appeals was clearly correct in concluding that the FCC had no authority to issue the Declaratory Ruling, it is the position of the Candidates that the issue of whether the court of appeals should have entertained the petition and set the Declaratory Ruling aside (rather than dismissing the petition) would not, *alone*, warrant certiorari in this case.

authority or duty to investigate, determine policy, or formulate rules, with respect to preemption of state causes of action or the jurisdiction of any court. *See* Federal Communications Act, 47 U.S.C. §§ 151-613 (the "Communications Act").

The FCC's authority in Section 315(d) of the Communications Act to adopt rules to "carry out" Section 315 does not enlarge its jurisdiction. Section 315(d) simply permits the FCC to elaborate on the meaning of the various terms used in Section 315, and reflects:

> Congress' decision not to legislate in detail, but rather to set out broad categories . . . and leave the Commission with the task of implementing Congressional intent.

Chisholm v. FCC, 538 F.2d 349, 357 (D.C. Cir.), *cert. denied*, 429 U.S. 890 (1976).

The Communications Act explicitly provides that it does not "in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 47 U.S.C. § 414. Although Section 303 of the Communications Act authorizes the FCC to exercise various powers with respect to interstate communications in wire and radio as the public convenience, interest and necessity may require, "[t]his criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power." *National Broadcasting Co. v. United States*, 319 U.S. 190, 216 (1943).

Even if Congress had delegated the authority to the FCC to preempt state law causes of action, this Court's recent decision in *Plaut v. Spendthrift Farm, Inc.*, 115 S.Ct. 1447 (1995) indicates that such a delegation would have been unconstitutional, at least as applied to the federal courts in diversity cases. In *Plaut*, this Court held unconstitutional a federal statute which purported to provide for reinstatement of certain types of securities fraud claims previously held time-barred by this Court. In so holding, this Court identified at least three types of legislation which

could require a federal court to exercise judicial power in a manner that Article III forbids:

> The first appears in *United States v. Klein*, 13 Wall. 128, 20 L. Ed. 519 (1872), where we refused to give effect to a statute that was said "[t]o prescribe rules of decision to the Judicial Department of the government in cases pending before it." *Id.*, 13 Wall. at 146. . . . The second type of unconstitutional restriction upon the exercise of judicial power identified by past cases is exemplified by *Hayburn's Case*, 2 Dall. 409 (1792), which stands for the principle that Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch. *See, e.g., Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 . . . (1948). . . . Article III establishes a "judicial department" with the "province and duty . . . to say what the law is" in particular cases and controversies. *Marbury v. Madison*, 1 Cranch 137, 177, 2 L. Ed. 60 (1803). The record of history shows that the Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy — with an understanding, in short, that "a judgment conclusively resolves the case" because "a 'judicial Power' is one to render dispositive judgments."

Id. at 1452-1453 (citations omitted). [3]

The Declaratory Ruling purports to prescribe a rule of decision in federal diversity cases by stating that "any state cause of action depending on any determination of the lowest unit charge under Section 315(b) or of some other duty arising under that subsection that is initiated in a federal court pursuant to diversity jurisdiction also is preempted *and should be dismissed.*" *FCC App.* at 40a-41a n.8 (emphasis added). Depending on how the FCC or the broadcasters would seek to enforce the Declaratory Ruling, the ruling could implicate the other two Article III types of cases identified in *Plaut* as well. *See, e.g., Town of Deerfield v. FCC*, 992 F.2d 420 (2d Cir. 1993), discussed in Section 2(a) below.

In the only opinion of this Court which appears to have addressed a similar situation involving a federal agency, this Court held that a Department of Labor regulation (29 C.F.R. § 500.122(b)), which purported to provide that state workers' compensation benefits constituted an exclusive remedy, was entitled to no deference by the courts:

> Congress clearly envisioned, indeed expressly mandated, a role for the Department of Labor in administering the statute by requiring the Secretary to promulgate standards implementing [the Agricultural Worker Protection Act] motor vehicle provisions. This delegation, however, does not empower the Secretary to regulate the scope of judicial power vested by the

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[3] This fundamental distinction between judicial functions and legislative functions is recognized in state constitutions as well. *See, e.g. Martin v. Baldwin*, 215 Ga, 293, 299, 110 S.E.2d 344, 350 (1959) (*quoting McCutcheon v. Smith*, 199 Ga. 685, 685, 35 S.E.2d 144, 145 (1945):

> The resolution made no change in [the Georgia statute], but merely declared the legislative intent. This "is clearly an attempt by the legislature to perform a judicial function by construing a law, and offends [the separation of powers provisions of the former Georgia Constitution] and is void."

> statute. Although agency determinations within the scope of delegated authority are entitled to deference, it is fundamental "that an agency may not bootstrap itself into an area in which it has no jurisdiction." Accordingly, the Secretary's conclusion that workers' compensation benefits, where available, provide the exclusive remedy for violations of AWPA is not entitled to *Chevron* deference.

Adams Fruit Co. v. Barrett, 494 U.S. 638, 650 (1990) *(quoting Federal Maritime Comm'n v. Seatrain Lines, Inc.,* 411 U.S. 726, 745 (1973)).

The Petitioners attempt to justify the FCC's authority to issue the Declaratory Ruling by making two arguments: (1) the Petitioners argue that the FCC has the authority to issue a ruling, binding upon all state courts and federal courts in diversity cases, that Congress intended to preempt all state law causes of action dependent upon any determination under Section 315(b), and that Congress intended the sole forum for adjudicating such matters to be the FCC; and (2) even if such Congressional intent is lacking, the Petitioners argue that the Declaratory Ruling can be justified as an exercise of plenary power by the FCC to preempt state law causes of action dependent upon any determination under Section 315, and to oust the jurisdiction of the state courts, and the federal courts in diversity cases, to adjudicate such matters. These positions are contrary to the precedents of this Court.

1. **Binding Interpretation of Congressional Intent.** The FCC first attempts to justify the Declaratory Ruling as a proper interpretation of Congress' intent to preempt various state law causes of action. This Court, however, has specifically stated that this type of issue is one peculiarly reserved for judicial resolution. *See Piper v. Chris-Craft Indus.,* 430 U.S. 1, 42 n.27 (1977):

> [The SEC's] presumed "expertise" in the securities-law field is of limited value when the narrow legal issue is

> one peculiarly reserved for judicial resolution, namely whether a cause of action should be implied by judicial interpretation in favor of a particular class of litigants.

See also Califano v. Sanders, 430 U.S. 99, 109 (1977) ("Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions.").

2. **FCC's Plenary Authority to Preempt.** If Congressional intent is lacking, the Petitioners argue that the FCC itself had plenary authority to preempt all state causes of action requiring a determination of the lowest unit charge, and plenary authority to oust the state courts (and the federal courts in diversity cases) of jurisdiction over such matters, in order to insure uniform interpretations of Section 315(b). Neither the FCC nor the Broadcasters cited any precedent, nor to the knowledge of the Candidates does any exist, where the FCC or any other federal agency has purported to preempt a state law cause of action or to oust state courts (or federal courts in diversity cases) of jurisdiction.

All prior preemption orders issued by the FCC involved the preemption of inconsistent state regulations of wire and radio. *See, e.g., City of New York v. FCC,* 486 U.S. 57 (1988)(preemption of signal-quality regulation of cable television); *State Corp. Comm'n v. FCC,* 787 F.2d 1421 (10th Cir. 1986)(preemption of state utility commission's altering of sampling periods used by local telephone companies to allocate equipment costs); *New York State Comm'n on Cable Television v. FCC,* 749 F.2d 804 (D.C. Cir. 1984)(preemption of state and local entry regulation of SMATV systems); *National Ass'n of Regulatory Util. Comm'rs v. FCC,* 746 F.2d 1492 (D.C. Cir. 1984)(preemption of state restrictions on the resale and sharing of all interstate WATS service used exclusively in interstate commerce); *New York State Comm'n on Cable Television v. FCC,* 669 F.2d 58 (2d Cir. 1982)(preemption of New York cable television statute which

prohibited receipt of federally authorized pay programming on MATV systems).

The Candidates have found only two cases where the FCC purported to decide issues similar to those addressed in the Declaratory Ruling. In both cases, the courts concluded that the FCC acted beyond its authority.

(a) In *Town of Deerfield v. FCC,* 992 F.2d 420 (2d Cir. 1993), the FCC had issued a regulation (47 C.F.R. § 25.104 (1992)), which purported to preempt state and local zoning ordinances that differentiated between certain types of satellite antennas. After four different courts had ruled in favor of the Town of Deerfield and against the owner of a satellite antenna that a specific zoning ordinance enacted by the Town of Deerfield was *not* within the scope of the FCC's preemption, the owner of the satellite antenna petitioned the FCC for a ruling that the Deerfield ordinance was, in fact, preempted, contrary to the prior court rulings. The FCC issued the requested declaratory ruling, and held that each of the four courts had decided the preemption issue incorrectly. *Town of Deerfield,* 992 F.2d at 427. The Town of Deerfield appealed the FCC's ruling to the Second Circuit. On appeal, the Second Circuit reversed the FCC's ruling, stating:

> Congress cannot "prescribe a rule for the decision of a cause in a particular way," nor may Congress, consistent with constitutional principles, provide for executive branch review of a judicial determination. Simply put, if a judgment of an Article III court were subject to revision by a coordinate branch, it would not be the exercise of judicial power. Since neither the legislative branch nor the executive branch has the power to review judgments of an Article III court, an administrative agency such as the FCC, which is a creature of the legislative and executive branches, similarly has no such power.
>
> * * * *

> . . . [T]he Commission in effect sought to modify the jurisdiction of Article III courts, with respect to any issue of the preemptive effect of § 25.104, to deprive them of the power to render anything but advisory opinions. . . . [The] Commission plainly has no power to request or require such a court to render an opinion that is merely advisory. Nor has the Commission called to our attention any authority — and we are aware of none — giving it the power to prevent an Article III court from performing its duty to render a binding judgment in a live case or controversy.

Town of Deerfield, 992 F.2d at 428-429 (citations omitted).

Under the reasoning of *Town of Deerfield,* the FCC does not have the authority, as the Broadcasters argue to this Court, to issue a declaratory ruling which purports to apply "not just prospectively to bar future courts from suits to enforce Section 315(b), but also retrospectively to bar suits initiated prior to the issuance of the Ruling." *Broadcasters' Petition* at 19.[4]

(b) The only other case the Candidates have located where the FCC purported to address a similar issue is *In re Port Huron*

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[4] The specific case which the FCC apparently sought to bar retroactively was *Dickinson v. Cosmos Broadcasting Co.,* Circuit Court for Montgomery, Alabama, Case No. CV-91-67-P (Order, released Sept. 23, 1991). *See FCC App.* at 88a-89a. In that case, a federal district court in Alabama held that a complaint filed in state court by a political candidate against a broadcaster for an alleged violation of Section 315(b) did not present a federal question warranting removal of the case to federal court, and was "essentially local in nature." The federal court remanded the case to the Alabama state court for further proceedings. *Dickinson v. Cosmos Broadcasting Co.,* Civil Action No. 91-T-072-N (M.D. Ala.) (Order, released April 1, 1991). *See FCC App.* at 89a. On remand, the state court denied the broadcaster's motion to dismiss on the grounds of preemption. *Id.* at 93a n.8. In its Public Notice issued on October 10, 1991, the FCC criticized the *Cosmos* case, and explicitly stated that "the Commission believes that it would be advisable for courts to stay any ongoing proceedings pending the issuance of any declaratory ruling as a result of this notice." *See FCC App.* at 93a-94a n.9.

Broadcasting Co., 12 FCC 1069 (1948). In that proceeding, in connection with a broadcasters' license application, the FCC stated, gratuitously, that it believed that Section 315(a) of the Communications Act required the broadcast of defamatory material. This issue was not decided by this Court until eleven years later in *Farmers Educ. and Coop. Union v. WDAY, Inc.,* 360 U.S. 525 (1959), the case in which this Court held that there is federal immunity for broadcasting defamatory material under Section 315(a) of the Communications Act.

Since neither this Court nor any other court had yet ruled on the immunity issue, shortly after the FCC issued its 1948 decision in *Port Huron,* a broadcasting station in Texas brought an action in federal district court to annul the FCC's ruling. *Houston Post Co. v. United States,* 79 F. Supp. 199 (D. Tex. 1948). The station stated that it had a policy of allowing political candidates access to the media, and that unless the FCC's interpretation were set aside, the station would be placed in the untenable position of either broadcasting defamatory statements, or losing its station license for violation of Section 315(a).

In *Houston Post,* the Texas federal court concluded that the FCC could not have intended its opinion to have the force of law, emphasizing that the subject matter of preempting state causes of action was not one within the realm of the FCC's authority or expertise:

> This subject matter in general is the reach and the confines, respectively, of state and federal laws operating in the same general field, a question of the greatest difficulty and delicacy . . ..
>
> * * * *
>
> . . . Indeed, in the uncertain and doubtful state of the law as to the intent of Congress, in enacting the section to exclude the operation of libel laws, we think it judicially inconceivable that the Commission, a body of public servants entrusted by Congress with powers of

> supervision over communications by radio, could, with considerations of fair play and just administration in mind, have so ordered.
>
> In the present state of the law, that is in the absence of congressional action clarifying its intent and purpose, or of authoritative judicial decision, we think it doubtful that the Commission would have power to lay down a binding rule or regulation of the nature of that expressed in its opinion.

Houston Post, 79 F. Supp. at 203-204.

Similarly, in this case, the issue of preemption of state causes of action, and the ouster of state court jurisdiction (and federal diversity jurisdiction) are questions of great difficulty and delicacy, with respect to which the FCC has no expertise. This Court even has difficulty with these kinds of issues. For example, this Court has described the issue of whether a state cause of action is preempted by the National Labor Relations Act as a "knotty problem" which has engendered literally hundreds of court cases and "demonstrated the need for this Court to provide a fuller explication of the premises upon which *Garmon* rests . . .." *Amalgamated Ass'n of Street, Elec. Ry., and Motorcoach Employees v. Lockridge,* 403 U.S. 274, 277 (1971) (*referring to San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236 (1959)). The federal courts are frequently required to wrestle with *Garmon* preemption issues.[5] There is no hint in any of these cases that any *Garmon* preemption issue could have been resolved by a plenary "preemption order" by the National Labor Relations Board similar to the Declaratory Ruling issued by the FCC in this proceeding.

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[5] *See Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6,* 493 U.S. 67 (1989); *Communications Workers v. Beck,* 487 U.S. 735 (1988); *Caterpillar, Inc. v. Williams,* 482 U.S. 386 (1987); *International Long Shoremen's Ass'n v. Davis,* 476 U.S. 380 (1986).

The Candidates respectfully submit that it is inconceivable that Congress intended for the FCC to issue a declaratory ruling purporting to have any preemptive effect upon any state law cause of action, or limiting the jurisdiction of any court, much less the vaguely described, and all-encompassing preemptive effect contemplated by this Declaratory Ruling. The Candidates submit that the law in this area is settled, and needs no further elaboration by this Court.

CONCLUSION

For the foregoing reasons, the Court should deny the petitions for a writ of certiorari requested by the FCC and by the Broadcasters.

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Nos. 95-1197 and 95-1200

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ZELL MILLER, *et al.*,
Cross-Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA (No. 95-1200) *and* NATIONAL ASSOCIATION OF BROADCASTERS (No. 95-1197), *et al.*,
Cross-Respondents.

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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CROSS-RESPONDENTS' BRIEF IN RESPONSE TO CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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4 pp

RULE 29.6 LIST

In their Petition for a Writ of Certiorari (filed Jan. 26, 1996), the Petitioners listed their parent corporations and nonwholly owned subsidiaries. Pursuant to Rule 29.6, that list is hereby incorporated into this document.

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CROSS-RESPONDENTS' BRIEF IN RESPONSE TO CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

The content of the Candidates' Conditional Cross-Petition for a Writ of Certiorari demonstrates that there is no material dispute among the parties about the importance of resolving on the merits the issue of the FCC's authority to pre-empt state law causes of action under Section 315(b). Accordingly, the Court should grant the parties' Petitions and Cross-Petition and determine whether the FCC's Declaratory Ruling is authorized by law.

1. The Broadcasters and the United States have already asked this Court to review the Eleventh Circuit's

determination that, despite express authorization from Congress in the Administrative Procedure Act, the FCC may not pre-empt state law through the use of a declaratory order. See Pet. of National Association of Broadcasters, *et al.*, at i, 16-20; Pet. of the United States at 18-22. The Candidates also recognize the importance of the reviewability of declaratory orders, arguing that "this Court should clarify the circumstances under which a Declaratory Ruling of the FCC is subject to judicial review." Conditional Cross-Pet. at 6-7. For the reasons stated in the Petitions of the Broadcasters and the United States, the Court should review this question.

2. The Candidates' other question for review is "whether Congress intended the preemption effected by the Declaratory Ruling." *Id.* at i. In their petition, the Broadcasters did not present this question for review because it was the alternative rationale of the FCC in the Declaratory Ruling. The Broadcasters firmly believe that the Declaratory Ruling can and should be sustained on the basis that the FCC properly invoked its own preemption authority as delegated by Congress. If this Court grants review on that question and agrees with the Broadcasters, it will be unnecessary to decide whether Congress intended to pre-empt state law causes of action under Section 315. Nevertheless, the Broadcasters do not oppose review of this latter question.

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REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

Although the Candidates' Brief ("Opp.") is termed an "Opposition" to the petitions of the Broadcasters and the United States, that title obscures the considerable agreement among the parties concerning the propriety of review in this Court of the Eleventh Circuit's decision in *Miller* v. *FCC*, 66 F.3d 1140 (11th Cir. 1995). First, there is no dispute between the parties that the ruling below that no case or controversy existed was incorrect. As the Candidates concede, "[t]he putative preemptive effect of the Declaratory Ruling created a sufficient case or controversy." Conditional Cross-Pet. at 7. Thus, the parties agree that the question of the authority of the FCC to issue a pre-emptive order is the real question posed by the holding below. This holding is worthy of review because, contrary to the Administrative Procedure Act and decisions of this Court, it effectively prevents federal

agencies from using declaratory orders to pre-empt state law. Pet. at 16-20; Pet. of United States at 18-22.

Second, although the Candidates' "Opposition" and Conditional Cross-Petition indicate that they disagree with the Broadcasters and the United States on the merits, there is little in either filing disputing that the scope of the FCC's authority to pre-empt state law is an important question or that the Eleventh Circuit's decision will have serious adverse practical effects for the FCC particularly, and all federal agencies generally. Indeed, the Candidates' filings indicate that they are nearly as anxious to have these issues resolved as are the Broadcasters and the United States—albeit disagreeing over the proper resolution. Conditional Cross-Pet. at i, 6-11.

Despite the general agreement on these issues, the Candidates nevertheless hedge their position and oppose the petitions, primarily by attempting to rebut the showing of the Broadcasters and the United States that the ruling below fundamentally misconstrues this Court's decisions regarding an agency's pre-emption power.[1] Even though the Eleventh Circuit's decision provided no support for its assertion that the FCC could not pre-empt state law, the Candidates claim that the decision "reflects fundamental principles of constitutional law." Opp. at 5. The Candidates then provide an inventory of constitutional law principles in search of a rationale behind the

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[1] It should not be surprising that the Candidates would attempt to provide the justification—missing in the opinion below—to support the court's holding that "it is axiomatic that Congress has not delegated, and could not delegate, the power to any agency to oust state courts and federal district courts of subject matter jurisdiction." Pet. App. 9a. This is because the court's dismissal of the Candidates' petition for review was tantamount to a holding on the merits that the FCC had no authority to pre-empt state causes of action. Accordingly, denial of the petitions for certiorari would be almost as beneficial to the Candidates as a win on the merits. *See* Pet. at 11.

decision below, *id.* at 5-9, but the Candidates ultimately fail to demonstrate how their list of principles casts doubt upon, or even applies to, the FCC's Declaratory Ruling. While a complete exposition of the merits should properly await the Court's plenary review, several of the Candidates' arguments warrant a response because they involve fundamental misreadings of the decisions of this Court.

1. First, the Candidates explain that the Eleventh Circuit's holding (and the total lack of support for it) was justified under a " 'deeply rooted presumption in favor of concurrent state court jurisdiction.' " Opp. at 5 (quoting *Tafflin* v. *Levitt*, 493 U.S. 455, 459 (1990)). Even a casual reading of *Tafflin* and other relevant precedent makes clear that the presumption applies only when determining whether Congress or the agency *intended* to preempt state law. *Tafflin*, 493 U.S. at 458-59; *Hillsborough County* v. *Automated Medical Labs., Inc.*, 471 U.S. 707, 715 (1985). Once that intent is clearly expressed, as it was in the FCC's Declaratory Ruling, the presumption is overcome, and thus it has no relevance to analyzing the scope of an agency's pre-emption power. *Tafflin*, 493 U.S. at 45 (stating that the presumption "is, of course, rebutted if Congress affirmatively ousts the state courts of jurisdiction"); *Hillsborough County*, 471 U.S. at 715-16 (noting that, "[o]f course, the same principles [of the pre-emption presumption] apply where, as here, the field is said to have been pre-empted by an agency"). Accordingly, if, as the Candidates assume, the Eleventh Circuit's holding "reflects" this principle of constitutional law, then the ruling conflicts with decisions of this Court for yet another reason and thus certiorari is doubly warranted.

2. The Candidates next assert that Congress did not delegate to the FCC in the Communications Act sufficiently broad power to encompass the pre-emption of state law in the Declaratory Ruling. Opp. at 5-6. The Candidates' citation to the entire Communications Act for the proposition that the "FCC has no authority or duty to

investigate, determine policy, or formulate rules, with respect to preemption of state causes of action," *id.*, fails to account for the specific authority Congress delegated to the FCC in Sections 4(i) and 303(r) of the Communications Act. This Court has described that delegation of power as giving " 'broad authority' " and " 'a comprehensive mandate' with 'not niggardly but expansive powers.' " *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 167-68, 173 (1968) (citation omitted). Under both those sections, and similar general grants of authority in other organic statutes, this Court has repeatedly permitted agencies to pre-empt state law. See, *e.g.*, *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 160-61 (1982) (upholding agency pre-emption where Congress delegated to agency the "authoriz[ation], under such rules and regulations as it may prescribe, to provide for [*inter alia*] the . . . operation and regulation of" savings and loans) (citation omitted); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 700 (1984) (permitting agency pre-emption under "broad responsibilities" granted to FCC by Congress in Section 2(a) of the Communications Act).

Incredibly, and ignoring the case law cited in the petitions, Pet. at 15 (citing to *Kay* v. *FCC*, 443 F.2d 638, 643-44 (D.C. Cir. 1970); *Chisholm* v. *FCC*, 538 F.2d 349, 357 (D.C. Cir.), *cert. denied*, 429 U.S. 890 (1976)), the Candidates assert that Congress's even more specific delegation of authority in Section 315(d) is meant merely to "permit[] the FCC to elaborate on the meaning of the various terms used in Section 315." Opp. at 6. That section authorizes the FCC to "precribe appropriate rules and regulations to carry out" Section 315, 47 U.S.C. § 315(d), and courts of appeals examining this section have confirmed that "enforcement of the statute . . . [is] vested in the Federal Communications Commission," thus undercutting the Candidates' crabbed reading of § 315(d). See, *e.g.*, *Belluso* v. *Turner Com-*

munications Corp., 633 F.2d 393, 396-97 (5th Cir. 1980).[2]

The Candidates similarly suggest that the FCC has exceeded its delegated authority from Congress by pre-empting entire state causes of action rather than inconsistent state regulations. See, *e.g.*, Opp. at 10 (stating there is no precedent for "the FCC or any other federal agency" to "preempt a state law cause of action"); Conditional Cross-Pet. at 14 (distinguishing relevant cases on that ground). Again, however, if the Candidates are correct in asserting that this is the principle of law "reflect[ed]" in the ruling below, then the decision certainly warrants further review. Under this Court's decisions in *de la Cuesta* and *City of New York* v. *FCC*, 486 U.S. 57 (1988), assuming there has been a sufficiently broad delegation of authority, an agency's power to pre-empt is as broad as that possessed by Congress. And, it is indisputable that Congress is able to pre-empt an entire state law cause of action. See, *e.g.*, *Farmers Educ. & Coop. Union of Am.* v. *WDAY, Inc.*, 360 U.S. 525, 535 (1959) ("abrogat[ing]" all state law "causes of action for libel"); *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 140-41 (1990).[3]

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[2] The Candidates suggest, Opp. at 6, that, in the Communications Act's "savings clause," 47 U.S.C. § 414, Congress limited the ability of the FCC to pre-empt state law claims under Section 315(b). As the FCC recognized, *see* Pet. App. 50a-51a, that clause, which provides that the Act does not "in any way abridge or alter the remedies *now existing* at common law or by statute," 47 U.S.C. § 414 (emphasis added), plainly does not limit the FCC from pre-empting state law claims under Section 315(b), because those claims were not "now existing," for such claims by definition only exist because of the duties imposed by the Communications Act. *See Arrow Transp. Co.* v. *Southern Ry.*, 372 U.S. 658, 671 n.22 (1963); *Comtronics, Inc.* v. *Puerto Rico Tel. Co.*, 553 F.2d 701, 707-08 n.6 (1st Cir. 1977).

[3] The Candidates cite *Adams Fruit Co.* v. *Barrett*, 494 U.S. 638 (1990), to support the argument that an agency may not "regulate the scope of judicial power vested by the statute." Opp. at 8-9. Apart from the fact that the language relied upon by the Candi-

3. The Eleventh Circuit stated—again without explanation—that Congress "could not delegate" to the FCC the power to pre-empt state law and thereby oust courts of jurisdiction. According to the Candidates, this holding "reflects" two fundamental principles of constitutional law contained in Article III: first, that the legislative or executive branches are not permitted to "prescribe a rule of decision in federal diversity cases," Opp. at 8 (relying on *Plaut* v. *Spendthrift Farm, Inc.*, 115 S. Ct. 1447 (1995)), and second, that Congress (and thus an agency) cannot " 'provide for executive branch review of a judicial determination.' " *Id.* at 11 (quoting *Town of Deerfield* v. *FCC*, 992 F.2d 420, 428-29 (2d Cir. 1993)). The holding below, however, could not "reflect" these principles, no matter how fundamental they are, because the FCC's Declaratory Ruling plainly did not violate either principle.

The Candidates conclude that the FCC's Declaratory Ruling "purports to prescribe a rule of decision" because it states that any cause of action under § 315(b) initiated in federal court " 'is preempted *and should be dismissed.*' " Opp. at 8 (quoting United States Pet. App. 40a n.8) (emphasis added by Candidates). As the language from *Plaut* that the Candidates omit from their citation indicates, however, Congress (or an agency acting under delegated authority) does not prescribe a rule of decision

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dates was dicta, the statute involved in that case, the Agricultural Worker Protection Act, delegated to the Department of Labor only the power to set substantive standards of conduct. *Adams Fruit*, 494 U.S. at 649-50. Congress in the Act expressly created a federal private right of action and thus did not delegate any enforcement authority to the Department of Labor. *Id.* Accordingly, the Department's views regarding the pre-emptive scope of the federal right of action were entitled to no weight. In the Communications Act, on the other hand, Congress has "charged [the FCC] with the statute's enforcement," *Hernstadt* v. *FCC*, 677 F.2d 893, 903 (D.C. Cir. 1980), both in the general grant of authority and in Section 315(d). *See supra* at 4-5. Accordingly, *Adams Fruit* provides no support for the Eleventh Circuit's holding.

merely by " 'amend[ing] applicable law.' " *Plaut*, 115 S. Ct. at 1452 (citation omitted). That is what the FCC has done in its Declaratory Ruling: amended its regulations under the Communications Act to pre-empt state causes of action and to establish a uniform, federal law.

Similarly, nothing in *Town of Deerfield* remotely supports the Candidates' arguments. In that case, the FCC improperly issued an order in an adjudicatory proceeding which already had been decided by four other courts and which therefore should have been dismissed under basic concepts of collateral estoppel. *Town of Deerfield*, 992 F.2d at 427-29. In contrast, nothing in the Declaratory Ruling purported to reverse final judicial determinations of law; the FCC merely invoked its delegated authority from Congress and issued a rule of law for courts to apply.

4. Finally, the Candidates, in passing, argue that the FCC's determination that Congress itself intended to pre-empt state law causes of action under Section 315 is improper. The Broadcasters did not petition the Court for review of this issue, because it was the FCC's alternative holding, making it unnecessary for the Court to consider it in order to uphold the validity of the Declaratory Ruling. Now that the Candidates have cross-petitioned for review on this issue, however, the Broadcasters submit that the FCC's interpretation of Congress's intent in enacting Section 315 was entirely correct and that that interpretation is entitled to deference under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 842-45 (1984).[4] Thus, as the Broadcasters

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[4] The Candidates' argument that *Houston Post Co.* v. *United States*, 79 F. Supp. 199 (S.D. Tex. 1948) supports the ruling below is plainly without merit. Opp. at 13-14. That case is squarely inconsistent with *Chevron* and other decisions of this Court deferring to an agency's interpretation of the statute it administers. *See also Farmers Educ. & Coop. Union of Am.* v. *WDAY, Inc.*, 360 U.S. 525, 533 (1959) (holding that Congress pre-empted state libel causes of action through Section 315(a) and relying in part

state in their Response to the Conditional Cross-Petition, they do not oppose review of the question whether the FCC correctly found that Congress intended to pre-empt state law in enacting Section 315(b), along with the questions presented in the petitions of the Broadcasters and the United States. For reasons stated in the Response, however, the Broadcasters are doubtful this Court would have reason to address that issue.

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At the end of the day, the Candidates offer neither a serious defense of the Eleventh Circuit's holding nor a reason supporting the unwarranted restrictions on the powers of the FCC and other federal agencies generated by the court of appeals' holding that agencies lack power to pre-empt state common law causes of action. That holding unquestionably does violence to heretofore settled principles of administrative law and judicial review concerning the use of declaratory orders by federal agencies and thus the decision below warrants review by this Court.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the petitions, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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on "the fact that the Federal Communications Commission—the body entrusted with administering the provisions of the Act—has long interpreted § 315" as pre-empting state libel law).